ONTARIO
LABOUR RELATIONS BOARD
REPORTS

March/April 2006

Ontario

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2007-01066/

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2006] OLRB REP. MARCH/APRIL

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506.. 245

Bargaining Rights – Sale of a Business – Related Employer – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

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position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) - Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506 245

Certification – Construction Industry – Practice and Procedure – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both the application and the Form arrived at the Board on the same day although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BALKO DRYWALL INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 130

Certification – Construction Industry – Practice and Procedure – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA 154

Certification – Construction Industry – Practice and Procedure – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 274

Certification – Fraud – Membership Evidence – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud –

The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

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Certification – Intimidation and Coercion – Standing – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

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Change in Working Conditions – Interference with Trade Unions – Unfair Labour Practice – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

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Conciliation – Reference – The Minister asked whether he had the authority to appoint a conciliation officer, where the union gave the employer notice to bargain eight years after the collective agreement, containing no renewal clause, had expired – The employer did not assert that the union had abandoned its bargaining rights – The Board found that while s. 59(1) precludes notice from being given until the final 90 days of the collective agreement, it does not provide that notice may only be given in the final 90 days – Therefore the notice of intent to bargain was a valid s. 59(1) notice – The Board's advice to the Minister was that he had the authority to appoint a conciliation officer

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Construction Industry – Adjournment – Certification – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506.. 245

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BALKO DRYWALL INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 130

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PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 274

Construction Industry – Construction Industry Grievance – Discharge – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96 268

Construction Industry – Parties – Related Employer – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO 173

Construction Industry – Related Employer – Aecon Industrial and Aecon Buildings agreed that they carry on associated or related activities under common control and direction; however, they asserted that the Board ought not to exercise its discretion to declare the companies related – The Board found that AI and AB had long-rooted presence in different markets in the construction industry and that the evidence of eight years of projects showed: AI had not wavered from its historical focus as a constructor of heavy industry manufacturing operations, AI had not diverted work to AB; and most significantly, there was no evidence of movement of heavy industrial plant work from AI to AB – Since the applicant's bargaining rights had not been harmed by the continued existence and prosperity of AB, the Board declined to make a single employer declaration – Application dismissed

AECON BUILDINGS AND AECON INDUSTRIAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30 125

Construction Industry Grievance – Construction Industry – Discharge – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

OTIS CANADA INC., RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96 268

Construction Industry Grievance – Practice and Procedure – Two days after filing a grievance, the applicant advised the Board that the parties had agreed to adjourn the scheduled hearing to a date some six weeks later – The applicant specifically stated it was not consenting to "otherwise extend any time limits provided in the Board's Rules" – Although the responding party failed to file a timely Request for Hearing and Notice of Intent to Defend (Form A-87), the contact between the parties suggested to the Board that the responding party had expressed interest in the matter – The Board declined to proceed to determine the matter (issue a default judgement) without giving the responding party a further opportunity to file a Form A-87 together with the requisite fee – Matter deferred

LASALLE BACKHOE SERVICES; RE LIUNA LOCAL 625 186

Construction Industry Grievance – Remedies – The employer filed a grievance asking the Board to order the union to return a $50,000 bank draft, which was delivered to the union three years earlier to secure payment of contributions that might have been found owing either as a result of an audit that was to be conducted, or for future violations – There was no evidence of an audit having been done or violations of the collective agreement – The Board found no reason not to order the bank draft or equivalent money returned to the company – The Board made the order effective three weeks hence to give the union time to file a grievance and refer it to arbitration to establish any liability it may be able to establish – Grievance allowed

1210166 ONTARIO LTD. (C.O.B. D.C.C. CARPENTRY); RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA 121

Damages – Employment Standards – Reprisal – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK 179

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OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96.......... 268

Duty of Fair Representation – Judicial Review – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB 304

Duty of Fair Representation – Reconsideration – The union and employer sought reconsideration of a Board decision ordering that the applicant's grievance proceed to arbitration – Both the union and the employer stated they had not received notice of the consultation that gave rise to the decision – The parties submitted that the grievance had been taken to arbitration – The Board held that it was not necessary for it to determine whether or not the notice of consultation had been received by the union or the employer: if it was not, the Board's earlier decision would have to be set aside; if it was, the Board was satisfied that the union and employer had previously demonstrated an intention to participate in the proceeding; their failure to attend was inadvertent; the applicant cannot be prejudiced because his matter proceeded to arbitration – Reconsideration granted

MARK WILSON; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION & GENERAL WORKERS UNION OF CANADA (CAW-CANADA) & ITS LOCAL 222; RE A.G. SIMPSON AUTOMOTIVE SYSTEMS 302

Employment Standards – Damages – Reprisal – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK 179

Employment Standards – Related Employer – Three applicant companies appealed the employment standard officer's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C", a bankrupt company, and should be treated as one employer pursuant to s. 4 – The Board found that s. 4 requires a finding that both subsections (a) and (b) must be answered positively before there is a declaration of one employer under the section – There must be more than the mere fact that one company is solvent and the other not, before it amounts to an "effect" under the Act – That is, there must be some connection between the relationship and the insolvency – The Board found there was no evidence that the insolvency of C was caused or affected by its relationship with two of the companies, nor any evidence that any action taken in respect of the third company had the effect, either indirectly or directly, on the entitlements of the employees – Finally, the Board noted that it would not examine whether the principal of C personally had more money to invest in the company, since it would be inappropriate to examine the actions or holdings or personal worth outside the corporation – Application granted; direction to return the monies held in trust

NOVAQUEST FINISHING INC.; RE ABDURAHMAN ABDOULRAB, JOSEPHINE ADRES, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS 248

Employment Standards – Termination – This was an employee application under the *ESA, 2000* for review of a refusal to issue an Order to Pay termination and severance pay – After suffering a workplace injury, the employee did not work again for the responding party past February 28, 2003, although he continued to remain employed – On February 1, 2005, the responding party mailed him a pre-printed pension form replete with references to termination, both within the heading and throughout the various sections – The Board found that the most probable interpretation of the pension form was that the responding party unilaterally severed the applicant's employment consistent with the definition of "severance" under section 63(1)(a) – Whether or not it intended to sever the applicant's employment was immaterial – The Board also held that, in light of section 9(2)(b) of *O. Reg. 288/01*, the doctrine of frustration did not apply in this case to prevent the applicant's entitlement to severance – The onus was on the party raising the defence of frustration to demonstrate that the applicant's severance was not prohibited by the *Human Rights Code* – To succeed, the party was required to demonstrate that it had accommodated the applicant's injury to the point of undue hardship – This threshold had not been reached in this case – Since the applicant's severance pay entitlement comprised the monetary limit set by section 103(4), the Board concluded that it was unnecessary to determine whether the applicant was also entitled to termination pay – Application granted

RAINBOW CONCRETE INDUSTRIES LTD.; RE MARC BARRETTE AND DIRECTOR OF EMPLOYMENT STANDARDS 279

Fraud – Certification – Membership Evidence – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form

A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

OAKWOOD RETIREMENT COMMUNITIES INC.; RE SEIU LOCAL 1.ON; RE CANADIAN HEALTH CARE WORKERS (CHCW).. 262

Interference with Trade Unions – Change in Working Conditions – Unfair Labour Practice – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693.. 224

Intimidation and Coercion – Certification – Standing – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA).. 187

Judicial Review – Duty of Fair Representation – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB.. 304

Jurisdictional Dispute – A jurisdictional dispute arose between COPE and the CSU over the assignment of "Network Administrator" work to an employee of CUPE – CUPE argued that the Network Administrator duties fell within the job descriptions for Clerk-Typist and Secretary under the heading "other duties as assigned" – COPE submitted that the employee in question should be reclassified as either a Technology Analyst or a Technical Assistant, both of which fell within the COPE bargaining unit – CSU and ATSU, as an intervenor on behalf of CSU, argued that the Network Administrator duties fell outside the COPE bargaining unit – Moreover, CUPE, CSU and ATSU were parties to an agreement in which work that falls within the ATSU bargaining unit at the National Office of CUPE will fall within the CSU bargaining unit if performed outside the National Office - COPE argued that no reliance should be placed on this agreement as they were not a party to it and that the jurisdictional dispute was only between itself, CSU and CUPE – The Board rejected COPE's argument, holding that reference must be made to the overall collective bargaining relationships – The Board relied on the factors of economy and efficiency, employer past practice and employer preference in declining to change the assignment of work – Work assignment confirmed

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 491; RE CUPE AND CANADIAN STAFF UNION; RE ADMINISTRATIVE AND TECHNICAL STAFF UNION (ATSU).. 134

Lock-Out – Change in Working Conditions – Interference with Trade Unions – Unfair Labour Practice – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693 224

Membership Evidence – Certification – Fraud – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

OAKWOOD RETIREMENT COMMUNITIES INC.; RE SEIU LOCAL 1.ON; RE CANADIAN HEALTH CARE WORKERS (CHCW) 262

Occupational Health and Safety Act – Work Refusal – OPSEU appealed an Inspector's decision not to make an Order requiring the Ministry of Transportation (MTO) to provide OC (pepper) spray to its Transportation Enforcement Officers (TEOs), arguing this was contrary to section 25(2)(h) of the *OHSA* – The Union also appealed the Inspector's decision not to treat a work stoppage as a work refusal under section 43 of the *OHSA* – The Board held that under section 25(2)(h), it is not every precaution which must be taken by an employer, but only reasonable precautions – Determining what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors, including the cost of the precaution and its effect on efficiency – The Board established that the magnitude and the frequency of the risk of assault were relevant considerations in determining whether the provision of OC spray was necessary – The circumstances under which OC spray could be used were exceedingly rare – Further, deploying OC spray contradicted the MTO disengagement policy – Accordingly, the Board concluded that the issuance of OC spray was outside the range of reasonable precautions that the employer was required to take – The Board exercised its discretion not to make any decision with respect to the work refusal – Five years had passed between the work refusals and the conclusion of the hearing – Given that the work refusals were primarily about whether OC spray should be provided, and the merits of the TEOs' complaints were dealt with by the inspectors in a relatively short period of time, there was little benefit to be gained by deciding the work refusal issue so long after the fact – Appeal dismissed

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF TRANSPORTATION), MINISTRY OF LABOUR; RE ONTARIO PUBLIC SERVICE EMPLOYEES' UNION 196

Parties – Construction Industry – Related Employer – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO 173

Practice and Procedure – Adjournment – Certification – Construction Industry – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506.......... 245

Practice and Procedure – Certification – Construction Industry – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both the application and the Form arrived at the Board on the same day, although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BALKO DRYWALL INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891.......... 130

Practice and Procedure – Certification – Construction Industry – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA.......... 154

Practice and Procedure – Certification – Construction Industry – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.......... 274

Practice and Procedure – Construction Industry Grievance – Two days after filing a grievance, the applicant advised the Board that the parties had agreed to adjourn the scheduled hearing to a date some six weeks later – The applicant specifically stated it was not consenting to "otherwise extend any time limits provided in the Board's Rules" – Although the responding party failed to file a timely Request for Hearing and Notice of Intent to Defend (Form A-87), the contact between the parties suggested to the Board that the responding party had expressed interest in the matter – The Board declined to proceed to determine the matter (issue a default judgement) without giving the responding party a further opportunity to file a Form A-87 together with the requisite fee – Matter deferred

LASALLE BACKHOE SERVICES; RE LIUNA LOCAL 625 186

Reconsideration – Certification – Construction Industry – Practice and Procedure – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA 154

Reconsideration – Duty of Fair Representation – The union and employer sought reconsideration of a Board decision ordering that the applicant's grievance proceed to arbitration – Both the union and the employer stated they had not received notice of the consultation that gave rise to the decision – The parties submitted that the grievance had been taken to arbitration – The Board held that it was not necessary for it to determine whether or not the notice of consultation had been received by the union or the employer: if it was not, the Board's earlier decision would have to be set aside; if it was, the Board was satisfied that the union and employer had previously demonstrated an intention to participate in the proceeding; their failure to attend was inadvertent; the applicant cannot be prejudiced because his matter proceeded to arbitration – Reconsideration granted

MARK WILSON; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION & GENERAL WORKERS UNION OF CANADA (CAW-CANADA) & ITS LOCAL 222; RE A.G. SIMPSON AUTOMOTIVE SYSTEMS 302

Reconsideration – Practice and Procedure – Certification – Construction Industry – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 274

Reference – Conciliation – The Minister asked whether he had the authority to appoint a conciliation officer, where the union gave the employer notice to bargain eight years after the collective agreement, containing no renewal clause, had expired – The employer did not assert that the union had abandoned its bargaining rights – The Board found that while s. 59(1) precludes notice from being given until the final 90 days of the collective agreement, it does not provide that notice may only be given in the final 90 days – Therefore the notice of intent to bargain was a valid s. 59(1) notice – The Board's advice to the Minister was that he had the authority to appoint a conciliation officer

EVANS LUMBER AND BUILDERS SUPPLY LIMITED; RE WAREHOUSEMEN, TRANSPORTATION AND GENERAL WORKERS UNION, LOCAL 715 149

Related Employer – Adjournment – Certification – Construction Industry – Practice and Procedure – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506 245

Related Employer – Bargaining Rights – Sale of a Business – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

SERCO CANADA LTD; AND/OR DOCK PRODUCTS CANADA INC., SPX CANADA INC. AND/OR EDWARDS DOOR SYSTEMS LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700 290

Related Employer – Construction Industry – Aecon Industrial and Aecon Buildings agreed that they carry on associated or related activities under common control and direction; however, they asserted that the Board ought not to exercise its discretion to declare the companies related – The Board found that AI and AB had long-rooted presence in different markets in the construction industry and that the evidence of eight years of projects showed: AI had not wavered from its historical focus as a constructor of heavy industry manufacturing operations; AI had not diverted work to AB; and most significantly, there was no evidence of movement of heavy industrial plant work from AI to AB – Since the applicant's bargaining rights had not been harmed by the continued existence and prosperity of AB, the Board declined to make a single employer declaration – Application dismissed

AECON BUILDINGS AND AECON INDUSTRIAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30.................................... 125

Related Employer – Construction Industry – Parties – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO... 173

Related Employer – Employment Standards – Three applicant companies appealed the employment standard officer's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C", a bankrupt company, and should be treated as one employer pursuant to s. 4 – The Board found that s. 4 requires a finding that both subsections (a) and (b) must be answered positively before there is a declaration of one employer under the section – There must be more than the mere fact that one company is solvent and the other not, before it amounts to an "effect" under the Act – That is, there must be some connection between the relationship and the insolvency – The Board found there was no evidence that the insolvency of C was caused or affected by its relationship with two of the companies, nor any evidence that any action taken in respect of the third company had the effect, either indirectly or directly, on the entitlements of the employees – Finally, the Board noted that it would not examine whether the principal of C personally had more money to invest in the company, since it would be inappropriate to examine the actions or holdings or personal worth outside the corporation – Application granted; direction to return the monies held in trust

NOVAQUEST FINISHING INC.; RE ABDURAHMAN ABDOULRAB, JOSEPHINE ADRES, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS 248

Remedies – Construction Industry Grievance – The employer filed a grievance asking the Board to order the union to return a $50,000 bank draft, which was delivered to the union three years earlier to secure payment of contributions that might have been found owing either as a result of an audit that was to be conducted, or for future violations – There was no evidence of an audit having been done or violations of the collective agreement – The Board found no reason not to order the bank draft or equivalent money returned to the company – The Board made the order effective three weeks hence to give the union time to file a grievance and refer it to arbitration to establish any liability it may be able to establish – Grievance allowed

1210166 ONTARIO LTD. (C.O.B. D.C.C. CARPENTRY); RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA 121

Reprisal – Damages – Employment Standards – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK 179

Sale of a Business – Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506.. 245

Sale of a Business – Bargaining Rights – Related Employer – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business

relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

SERCO CANADA LTD; AND/OR DOCK PRODUCTS CANADA INC., SPX CANADA INC. AND/OR EDWARDS DOOR SYSTEMS LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700.. 290

Sale of Business – Construction Industry – Parties – Related Employer – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO.. 173

Settlement – Construction Industry – Parties – Related Employer – Sale of Business – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO.. 173

Standing – Certification – Intimidation and Coercion – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it

had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA).. 187

Termination – Employment Standards – This was an employee application under the *ESA, 2000* for review of a refusal to issue an Order to Pay termination and severance pay – After suffering a workplace injury, the employee did not work again for the responding party past February 28, 2003, although he continued to remain employed – On February 1, 2005, the responding party mailed him a pre-printed pension form replete with references to termination, both within the heading and throughout the various sections – The Board found that the most probable interpretation of the pension form was that the responding party unilaterally severed the applicant's employment consistent with the definition of "severance" under section 63(1)(a) – Whether or not it intended to sever the applicant's employment was immaterial – The Board also held that, in light of section 9(2)(b) of *O. Reg. 288/01*, the doctrine of frustration did not apply in this case to prevent the applicant's entitlement to severance – The onus was on the party raising the defence of frustration to demonstrate that the applicant's severance was not prohibited by the *Human Rights Code* – To succeed, the party was required to demonstrate that it had accommodated the applicant's injury to the point of undue hardship – This threshold had not been reached in this case – Since the applicant's severance pay entitlement comprised the monetary limit set by section 103(4), the Board concluded that it was unnecessary to determine whether the applicant was also entitled to termination pay – Application granted

RAINBOW CONCRETE INDUSTRIES LTD., RE MARC BARRETTE AND DIRECTOR OF EMPLOYMENT STANDARDS.. 279

Unfair Labour Practice – Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Sale of a Business – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506.. 245

Unfair Labour Practice – Certification – Intimidation and Coercion – Standing – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA).. 187

Unfair Labour Practice – Change in Working Conditions – Interference with Trade Unions – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693 224

Work Refusal – *Occupational Health and Safety Act* – OPSEU appealed an Inspector's decision not to make an Order requiring the Ministry of Transportation (MTO) to provide OC (pepper) spray to its Transportation Enforcement Officers (TEOs), arguing this was contrary to section 25(2)(h) of the *OHSA* – The Union also appealed the Inspector's decision not to treat a work stoppage as a work refusal under section 43 of the *OHSA* – The Board held that under section 25(2)(h), it is not every precaution which must be taken by an employer, but only reasonable precautions – Determining what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors, including the cost of the precaution and its effect on efficiency – The Board established that the magnitude and the frequency of the risk of assault were relevant considerations in determining whether the provision of OC spray was necessary – The circumstances under which OC spray could be used were exceedingly rare – Further, deploying OC spray contradicted the MTO disengagement policy – Accordingly, the Board concluded that the issuance of OC spray was outside the range of reasonable precautions that the employer was required to take – The Board exercised its discretion not to make any decision with respect to the work refusal – Five years had passed between the work refusals and the conclusion of the hearing – Given that the work refusals were primarily about whether OC spray should be provided, and the merits of the TEOs' complaints were dealt with by the inspectors in a relatively short period of time, there was little benefit to be gained by deciding the work refusal issue so long after the fact – Appeal dismissed

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF TRANSPORTATION), MINISTRY OF LABOUR; RE ONTARIO PUBLIC SERVICE EMPLOYEES' UNION 196

4306-05-G 1210166 Ontario Ltd. (c.o.b. D.C.C. Carpentry), Applicant v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Responding Party

Construction Industry Grievance – Remedies – The employer filed a grievance asking the Board to order the union to return a $50,000 bank draft, which was delivered to the union three years earlier to secure payment of contributions that might have been found owing either as a result of an audit that was to be conducted, or for future violations – There was no evidence of an audit having been done or violations of the collective agreement – The Board found no reason not to order the bank draft or equivalent money returned to the company – The Board made the order effective three weeks hence to give the union time to file a grievance and refer it to arbitration to establish any liability it may be able to establish – Grievance allowed

BEFORE: *David A. McKee*, Vice-Chair, and Board Members *Glenn Pickell* and *Rick Baxter*.

APPEARANCES: *Keith Burkhardt* for the applicant, *Michael McCreary* for the responding party.

DECISION OF THE BOARD; April 20, 2006

1. This application is a referral of grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995 ch.1 (the "Act"). It is unusual in that the applicant is an employer, 1210166 Ontario Ltd. c.o.b. D.C.C. Carpentry ("DCC"), seeking the return of monies paid to Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America ("the Union") as security for the payment of potential liabilities for violations of the collective agreement.

2. In 2002, the Trustees of the Health and Welfare Plan prescribed by the collective agreement between DCC and the Union, acted pursuant to Article 12.13 and demanded a bond in the amount of $50,000.00 from the responding party ("DCC"). Article 12.13 provides as follows:

> 12.13 Where the Trustees deem an employer to be persistently delinquent in remitting contributions they may require the employer to post security in the form of a cash deposit not to exceed fifty thousand dollars ($50,000.00) per fund to be held in trust by the Trustees for a period to be determined by the Trustees.

3. When DCC did not do so the Union filed a grievance and referred the grievance to the Board under section 133 of the Act for arbitration. On the day of the hearing the parties entered into Minutes of Settlement. Pursuant to those Minutes of Settlement DCC provided a bond in the form of a bank draft (not a letter of credit) for $50,000.00 on January 26, 2003. No time was set for the return of the bond. Again pursuant to the Minutes of Settlement, an audit of the books of DCC was commenced. We are unaware of whether it has been completed. DCC has not been advised of the results of the audit. DCC now wants its money back, and has referred this grievance to the Board seeking that relief.

4. The Union asks that we dismiss the grievance. In the Union's submission the bond was posted with the Trustees for the purposes demanded by the Trustees. It asserts the Board cannot require the Union to return something it does not have. It further asserts the Board has no jurisdiction over the Trustees as they are not parties to the grievance or to the collective agreement. In the Union's submission, if DCC seeks a return of the bond or the money, it must seek its remedies in the Superior Court of Justice. Therefore, the Union argues, this grievance must be dismissed.

5. We conclude that we do have jurisdiction to entertain the grievance. In 2002 the *Union*, not the Trustees, referred a grievance to the Board seeking an order that the employer post a bond in the amount of $50,000.00 as required by this provision. Counsel conceded that the Board might have refused to do so at that time. That is, the Board had the jurisdiction to look at the actions of the Trustees acting under that clause and to determine whether or not the order to post a bond was appropriate. It is not necessary to determine the scope of that review of the Trustees' decision here, as DCC consented to the order sought.

6. Article 12.13 addresses two issues: whether a bond should be posted and for how long it should be posted. The Trustees did not deal with or address the issue of the length of time for which the bond should be posted. That was not unreasonable, since it is not necessarily clear how long an audit of the sort contemplated in the Minutes of Settlement would take. However, it is inarguable that if the Union had asked the Board to order DCC to post a bond for 50 years, the Board would have had the jurisdiction to consider whether or not such a period of time was reasonable when making its order.

7. In the context of this case, DCC asks the Board to look at the reasonableness of the decision of the Union or of the Trustees to continue to retain the bond. There is no reason why the Board may not do so pursuant to Article 12.13 in the context of this grievance.

8. The scope of argument in this case is limited. The Union did not file a Notice of Intent to Defend/Participate in these proceedings in accordance with the Board's Rules. The Board issued a "default decision" as it has done many times at the Union's request in grievances it has referred to arbitration. The Board made a number of findings of fact and concluded:

> 11. However, the Board notes that Article 12.13 of the collective agreement states that the deposit can be held in trust by the Trustees "for a period to be determined by the Trustees" and that paragraph 12 of Schedule "B" to the Application states that "No satisfactory response" was received by the Applicant regarding the letters it sent to the responding party between June 2004 and November 2005. It is unclear what response was provided, and what the applicant considers to be a satisfactory response. It may be that the response(s) will disclose why the Trustees have not returned the deposit. Although it would appear that there may have been a violation of the collective agreement, given that the deposit has been held for more than three years, the Board is reluctant to make this declaration and grant the specific relief requested in the absence of this information.
>
> 12. The hearing remains scheduled for April 18, 2006. The facts stated in paragraph 10 above are not subject to dispute. In view of these facts, the responding party should be prepared to explain why the deposit has not been returned to the applicant.

9. Implicit in the findings of fact (not quoted above) and the conclusion quoted above is that (a) the Union was the party to whom the bond had been delivered and (b) the collective agreement permits and requires the Board to address the reasonableness of the decision not to return the bond some three and a half years after it was posted.

10. In *Weinmann Electric Ltd.* [2000] O.L.R.D. No. 260, the Board listed four factors that it would consider when a party who has failed to appear in proceeding in accordance with the Rules should be permitted to file its Notice of Intent and response, and to participate on all issues in the proceeding. In this case the Union has failed to meet two of them. It has offered no explanation for its late filing of a Notice of Intent. Further, it has provided no statement of the facts on which it would seek to rely. That is, counsel was unable to advise the Board the basis of the Trustees' decision to refuse to return the bond. We see no reason to revoke or vary the decision of April 12, 2006, or to permit the Union to participate to any extent other than the one that the Board indicated in its decision of April 12, 2006. That is, the Union may participate only to the extent that it was invited "to be prepared to explain why the deposit has not been returned to the applicant".

11. In fact the applicant was unable to do so. We have some sympathy for counsel in this case. The relations among the Trustees are apparently extremely fractious, to the extent that their communications may be no more than faxed comments. (This does not leave us with any great confidence that the Trustees acted in a dispassionate and considered fashion). Counsel was candid in admitting that he had only anecdotal understanding of the events relating to the Trustees' decision. Thus, even on the one area that the Board had directed the Union to be prepared to address, the Union was not in a position to provide any explanation.

12. Even within that context, however, the Union submits that the Board had no jurisdiction to require the Union to return something that is not in its possession and which is in the hands of the Trustees who were not party to the collective agreement or to this referral. Aside from the fact that we are not prepared to reconsider the findings of fact that were made in the April 12, 2006 decision (which makes no reference to the Trustees), we find this argument fails.

13. The original grievance pursuant to which the bond was posted was filed by the Union, not by the Trustees. In Board File No. 2334-02-G, the applicant was Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America. It filed the grievance, seeking an order that the responding party, DCC comply with the demand of the Trustees. This was in fact appropriate as the collective agreement makes no provision for the Trustees to enforce that provision directly. Only the Union may do so. In any event, since DCC consented to the issuing of an order, it could not (and did not try to) challenge the authority of the Union to file such a grievance in any event. The Board issued an order based on the conclusion that it had jurisdiction to do as the parties requested, and no party now seeks to revisit that question.

14. In that decision, the Board simply adopted the words drafted by the parties. The Minutes of Settlement asked that the Board issue:

> An order that the Responding party provide *to the Applicant* the documents/materials listed in Appendix "A", on or before January 31, 2003
>
> . . .

> Appendix "A"
>
> (iv) A letter of credit from a chartered bank in the amount of fifty thousand dollars ($50,000), payable to [Manion] Wilkins & Associates Ltd *to be held in trust* securing the payment of contributions under the collective agreement.

15. The Board obliged by issuing the order "direct[ing] the responding party to provide *to the applicant*, by January 31, 2003, with the documents listed in Appendix "A" of the Agreement, *including the letter of credit referred to therein*.

16. Quite simply, the Board's order, at the request of the parties, was that the bond be delivered to the applicant, the Union in this case, to be held in trust. The Union was to take physical possession of the bond. The bank draft is made out to Manion Wilkins & Associates, not to the Trustees or to Manion Wilkins & Associates as agents for the Trustees. It is not to be paid in satisfaction of a debt, but as security for any debt or liability that might be established in the audit contemplated in the Minutes of Settlement or otherwise. Therefore no party has any right to keep the $50,000.00 unless it establishes independently some debt or liability on the part of DCC for a violation of the collective agreement. Since the bond was impressed with an explicit trust, we will assume that the Union has taken steps to ensure that it has treated the bond with the appropriate level of care. If it is physically in the hands of the Administrator of the Trust Fund, it will be up to the Union to retrieve it.

17. Indeed, given the orders made below, Manion Wilkins & Associates will have no legal right to refuse to return it to the Union on the Union's demand.

18. Therefore, in this case the issue of the position of the Trustees does not arise. They are not the beneficiaries of any order of this Board, nor have they been given any power over the bond by this Board.

19. The Union asked that, if the Board were to find that it had the jurisdiction to issue the orders requested, that it be granted an adjournment for the purposes of summonsing the Trustees to testify as to the basis of their actions. Even assuming that evidence is relevant, the Union does not know what it is. Again, counsel is somewhat hamstrung by the hostility among the Trustees. However, the Board explicitly directed the Union to be prepared to lead that evidence on the date of hearing. It was unable to do so, or even to advise the Board of whether it had any relevant facts that it would seek to prove. Accordingly, we deny the request for an adjournment.

20. What we have, then, is an order that is three years old, requiring DCC to deliver to the Union a bond in the amount of $50,000.00 to secure payment of contributions that may be found to be owing, either as a result of the audit that was to be conducted at the same time or perhaps for future violations. We have no evidence of the result of any audit, nor is there an allegation of a violation of the collective agreement since January 31, 2003. There is no reason before us as to why the bond ought not to be returned. It was after all only security for the payment of potential liabilities. The $50,000.00 does not represent any sum owing to the Union or the Trustees. There is no good reason to deprive DCC of the use of that much money for any longer.

21. We therefore direct the applicant to return to DCC the bank draft delivered to it in January, 2003 or in the alternative to return to DCC the sum of $50,000.00. Although we do not

think it is necessary to do so, if greater certainty is needed, we reconsider and amend the December 16, 2002 decision in Board File No. 2334-02-G to add to paragraph 3(2) the words: "provided that the letter of credit shall be returned to the responding party [DCC] on or before May 9, 2006.

22. Our only concern is that there may be some liabilities, payment of which the original bond was intended to secure. If the Union has not completed its audit in this three-year period, it will be too late to realize on that security. However, if it is in a position to do so, it should be entitled to do so promptly. Therefore we make this order effective May 9, 2006, in order to give the Union the time to file a grievance and refer it to arbitration to establish any liability it is presently able to establish. If it is not able to do so, all of the $50,000.00 or the bank draft must be returned on or before May 9, 2006.

0256-05-G; 0257-05-R Sheet Metal Workers' International Association, Local 30, Applicant v. Aecon Industrial and **Aecon Buildings**, Responding Parties

Construction Industry – Related Employer – Aecon Industrial and Aecon Buildings agreed that they carry on associated or related activities under common control and direction; however, they asserted that the Board ought not to exercise its discretion to declare the companies related – The Board found that AI and AB had long-rooted presence in different markets in the construction industry and that the evidence of eight years of projects showed: AI had not wavered from its historical focus as a constructor of heavy industry manufacturing operations; AI had not diverted work to AB; and most significantly, there was no evidence of movement of heavy industrial plant work from AI to AB – Since the applicant's bargaining rights had not been harmed by the continued existence and prosperity of AB, the Board declined to make a single employer declaration – Application dismissed

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

APPEARANCES: *Robert MacDougall* and *Art White* for the applicant; *Carl Peterson, Jake Berg* and *Chris Rick* for the responding parties.

DECISION OF THE BOARD; April 25, 2006

1. This application seeks a determination that Aecon Industrial and Aecon Buildings be treated as a single employer within the meaning of section 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act"). The grievance referral in Board File 0256-05-G depends on the outcome of the application for a declaration of single employer.

2. Initially, the applicant has named Aecon Construction Group Inc. and Aecon Group Inc. as responding parties. At the first day of hearing, counsel for the applicant indicated that it has received assurances from counsel for all of the responding parties that neither Aecon Construction Group Inc. nor Aecon Group Inc. enter into construction contracts and on that basis, the applicant is content not to seek a remedy against them. Consequently, I have amended the style of cause accordingly. Counsel for the responding parties indicated that I would hear

something about Aecon Construction Group Inc. in the course of the proceedings because both Aecon Industrial and Aecon Buildings are divisions within Aecon Construction Group Inc.

3. The applicant, Sheet Metal Workers' International Association, Local 30 ("the union" or "the Sheet Metal Workers") holds bargaining rights with Aecon Industrial. The target of this application is Aecon Buildings. The responding parties agree that they meet the definition set out in section 1(4), which reads as follows:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The responding parties agree that they carry on associated or related activities under common control and direction. However, they assert that the Board ought not to exercise its discrection and make the declaration because Aecon Buildings is not operating in a manner that threatens or diminishes the bargaining rights held by the union with Aecon Industrial. To give the declaration the union seeks would, argued counsel for the responding parties, expand the bargaining rights of the union, something that the Board has regularly said is not the purpose of section 1(4).

4. There is no dispute that the responding parties have met their section 1(5) obligation to bring forward evidence that is relevant to the matters in issue. Counsel worked co-operatively to arrange a review of extensive document production, including the creation of various reports that were of interest to the union. The parties agreed to many of the facts, and all of the documents placed before the Board, which they helpfully whittled down to the necessary few. The oral evidence placed before the Board was, again, thanks to the parties' co-operation, entirely focused on the information necessary to the Board. The argument of both sides was concise, incisive and effective. In less than two days of hearing time, the parties placed before the Board all the information necessary to make a decision - a rare feat.

The Facts

5. Aecon Industrial is a division of Aecon Construction Group Inc. and is bound to the Provincial ICI agreement in the sheet metal industry. Aecon Construction Group Inc. is part of the Aecon Group Inc., a holding company. Aecon Buildings is also a division of Aecon Construction Group, and so is also part of Aecon Group Inc. While Aecon Industrial and Aecon Buildings operate independently on a day-to-day basis, the revenues they generate contribute to the overall performance of the Aecon Construction Group Inc. and the Aecon Group, in turn. In addition, the marketing of the Aecon Group Inc. makes reference to all of its construction companies, presenting to the world that "Aecon" possesses depth and expertise in all areas of the construction industry to meet the complete range of client needs.

6. The roots of Aecon Industrial can be traced to Nicholls-Radtke Ltd. ("Nicholls-Radtke"), a well-known construction company that has always worked in the industrial part of the

construction industry as a specialty trades mechanical contractor, building heavy industrial plants such as automotive, steel, power, petrochemical and hydro. Nicholls-Radtke had a longstanding collective bargaining relationship with the Sheet Metal Workers, dating at least to the 1980's, that has been honoured through the trail of corporate transactions that has ended with the Aecon Group owning Aecon Industrial.

7. Jake Berg, the President of Aecon Industrial, has been with Nicholls-Radtke followed by Aecon Industrial, since 1992. He testified that the business has always concentrated on jobs where the scope of work involves a building and installation of process-operating systems, principally electrical and piping systems. One example would be material handling systems. It is a multi-trade contractor that has always self-performed most of the work it has acquired. Mr. Berg said that Aecon Industrial has not seriously considered pursuing commercial work because it cannot compete in that market and its entire operation is geared to the industrial side. Its purchasing system, estimating staff and project management team are all focused on, and experienced in, industrial construction activities. Industrial construction is more complex, with more trades overlapping and a need to work around and with complex processing equipment. Each job tends to be unique, making the process of risk assessment before bidding more challenging. Some example of recent projects include a turnkey standby diesel generator at the Bruce Nuclear Centre; Casco Co-Gen Plant at London and Port Colborne; installing large vessels at Imperial Oil; and the maintenance contract at Stelco's Nanticoke plant.

8. The responding parties submitted a list of jobs performed or bid by Aecon Industrial from 1998 to August 2005. It is undisputed that throughout the time period, Aecon Industrial has never bid or performed the erection of a commercial building.

9. The responding parties also submitted a list of jobs performed by Aecon Buildings from 1998 to August 2005. Significantly, Aecon Buildings has never bid for nor erected an industrial project such as a power plant or automotive facility. I heard evidence that Aecon Buildings has not sought to perform industrial construction because it does not have staff with the ability to oversee the bidding or the completion of such work. Christopher Rick, Senior Vice President and General Manager of Aecon Buildings, testified that it does not have the expertise to assess the quality, scope or reasonableness of subcontractor bids for an industrial project.

10. The roots of Aecon Buildings can be found in Jackson Lewis Company Limited, ("Jackson Lewis"), an equally well-known company, started in 1913, that has focused on building commercial structures. The Sheet Metal Workers have never had a bargaining relationship with Jackson Lewis or any of the subsequent corporate versions that ultimately ended up as Aecon Buildings, a member of the Aecon Group.

11. Mr. Rick started with Jackson Lewis in 1988 and testified that it has always worked as a general contractor, building warehouses, and performing interior renovations for retail and commercial tenants and landlords. He explained that the typical project involves building a box, often a very large box, such as a new distribution facility for Federal Express at the Lester B. Pearson Airport. Federal Express ultimately installed a material handling system, but that part of the work was not performed by Aecon Buildings; it just built the "box".

12. Aecon Buildings typically provides a shell, roof, floor, walls, lighting and an HVAC system. It competes with general contractors such as Ellis-Don, Van Bots, Eastern Construction,

Ledcor and PCL. Mr. Rick testified that Aecon Buildings does not self-perform, and subcontracts 93% to 97% of the work it acquires. Aecon Buildings also performs some high-rise residential, amounting to about 3% of its business.

13. The subcontractors it uses are typically not operating in the industrial sector. Mr. Rick characterized the commercial building market in which it operates as highly aggressive, with the result that industrial subcontractors are not able to compete. The estimators who work for Aecon Buildings are skilled in assessing the quality, scope of work and price for bids from drywall, concrete forming, electrical, masonry, flooring and carpeting subcontractors but do not have the expertise to assess the pricing and scope of work for complex mechanical and electrical process systems. Consequently, Aecon Buildings does not compete in the industrial market. Mr. Rick testified that he has never been advised by anyone in the Aecon Group to go after the same work as Aecon Industrial. He cited one example where Aecon Buildings was asked by Toyota Woodstock to bid on the construction of the building envelope for its automotive facility. Aecon Buildings declined to bid after assessing that it did not have the expertise.

14. Mr. Rick acknowledged that its clients may refer to their buildings as "industrial buildings" since they are used as part of a commercial enterprise, and may be outfitted later with a material handling or other processing system. Mr. Rick agreed that some of the Aecon marketing says that Aecon Buildings constructs "industrial buildings" but that is meant to refer to the warehouse and other "box" structures that Aecon Buildings and Jackson Lewis have always constructed, not the heavy industrial plants that Aecon Industrial has specialized in.

15. There is also no evidence that Aecon Industrial has acquired work and then subcontracted any part of it to Aecon Buildings, nor has Aecon Industrial referred work to Aecon Buildings. Mr. Berg testified that neither the Aecon Group nor Aecon Construction Group had instructed him to refer work to Aecon Buildings. Mr. Berg said that his division is autonomous in the performance of its work from day to day, deciding what projects to bid on, and whether to self-perform or subcontract them. In cross-examination, Mr. Berg agreed that Aecon Industrial has constructed offices, as part of the construction of a plant or other industrial facility, but has never built a free-standing commercial office building or warehouse.

Argument

16. The parties' arguments are relatively simple. The responding parties assert that Aecon Buildings and Aecon Industrial are long-standing parallel businesses, one unionized, one non-union, each operating successfully, without impact on one another. In similar cases, where there is a long history of co-existence and no evidence of the non-union company taking away work from the unionized company, or otherwise eroding the union's bargaining rights, the Board has declined to exercise its discretion and make the section 1(4) declaration, concluding that to do so would expand, rather than protect, the bargaining rights of the union (see, for example, *Gerald Davidson Plumbing and Heating Limited*, [1984] OLRB Rep. Mar. 462 and *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. Mar. 308). In this case, counsel argued, Aecon Buildings and Aecon Industrial operate in different parts of the construction market. Counsel agreed that the Sheet Metal Workers' collective agreement covered work that would be performed by both Aecon Industrial and Aecon Buildings. But, each company has consistently kept to its market, and there is not a single instance where Aecon Buildings performed work that had historically

been the work of Aecon Industrial. Instead, each company, with long roots in their respective parts of the market, has continued to independently exist and thrive.

17. Counsel for the applicant argued that Aecon presents itself to the world as a large, diverse construction company, able to perform any kind of work to meet a range of client needs. Aecon presumably decided that opportunities for success came from consolidation, and the ability to present as a single, strong, widely experienced, construction facilitator. Such corporate and marketing choices have a legitimate business purpose, counsel argued, but they also have labour relations consequences. Counsel does not assert that Aecon Buildings has sought to undermine the union's bargaining rights, but it is concerned about incidental encroachment in the work that is subject to bargaining rights with Aecon Industrial, and consequent erosion. The applicant relied on *PCL Constructors Eastern Inc.*, [1995] OLRB Rep. Oct. 1277 and *PCL Employees Holdings Ltd.*, [1998] OLRD No. 2354. Both talked about the ease with which large, centrally-organized construction companies can change direction and focus, with the result that the activities of the non-union part of the business can encroach on bargaining rights held in a unionized part of the business. Counsel agreed that to this point, there is no clear evidence that Aecon Buildings has performed industrial work, but there is the potential for overlap. The *PCL* cases highlighted that a large company has the ability to change course and move into a different sort of market. Since Aecon is a large organization that promotes itself to the world as a single source builder of anything and everything, there is a potential to erode the union's bargaining rights, in the process of serving the diverse client base to which Aecon is marketing itself.

Analysis and decision

18. The cases that the applicant relies upon, particularly *PCL*, are factually different. In both *PCL* cases, the Board was faced with a unionized company that had ceased to perform work in Ontario as a result of a centralized, corporate decision. The related non-union company then went on to perform jobs that the Board found the unionized company would have performed when it was active. The Board, in those cases, had before it evidence of the non-union company filling the vacuum created when the unionized company ceased operating. In those circumstances, it is not surprising that the Board found that the operation of the non-union company had encroached on the bargaining rights of the union, and a single employer declaration was appropriate.

19. In the case before me, both the union and the non-union companies continue to exist and continue their long-rooted presence in different markets of the construction industry. Job listings, representing eight years worth of projects bid or performed by Aecon Buildings and Aecon Industrial were placed before me. They show that Aecon Industrial has not wavered from its historical focus as a constructor of heavy industry manufacturing operations. Aecon Industrial has not diverted work to Aecon Buildings or shared work with it. More significant, the eight-year project list of the non-union Aecon Buildings shows not a single instance of movement towards the heavy industrial plants that have been the mainstay of Aecon Industrial. Unlike the cases relied upon by the applicant, there is no evidence before me of the mischief that section 1(4) was intended to address. Aecon Industrial, and the applicant's bargaining rights, have not been harmed by the continued existence and prosperity of Aecon Buildings, notwithstanding that they are engaged in associated or related activities under common control and direction. Consequently, I decline to make a declaration that the responding parties are a single employer

within the meaning of section 1(4) of the Act. The application in Board File 0257-05-R is dismissed.

20. Since the union's grievance referral in Board File 0256-05-G was dependent on the Board making the single employer declaration, the grievance is also dismissed.

3923-05-R The International Union of Painters and Allied Trades, Local Union 1891, Applicant v. **Balko Drywall Inc.**, Responding Party

Certification – Construction Industry – Practice and Procedure – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both the application and the Form arrived at the Board on the same day, although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; March 7, 2006

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. The Chair of the Board authorized me pursuant to section 110(14)(a) of the Act to sit alone to determine this matter.

2. The Registrar has certified that the applicant had been found to be a trade union in an earlier proceeding under the Act. Therefore, having regard to the Registrar's certificate and section 113 of the Act, the Board finds that the applicant is a trade union within the meaning of sections 1(1) and 126 of the Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 153(1) of the Act on December 18, 2000, the designated employee bargaining agency is the International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades.

3. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

4. The Board finds that this is an application for certification within the meaning of section 128 of the Act and is an application made pursuant to section 158(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry

> referred to in the definition of "sector" in section 126 shall be brought by either,
>
> (a) an employee bargaining agency; or
>
> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

5. The applicant asserted that the nature of responding party's business affected by the application is drywall taping and related work. The responding party in its response accepted the applicant's characterization of the nature of its business.

6. The responding party in its response agreed with the bargaining unit description proposed by the applicant. The applicant and the responding party each listed five jobs in Board Area three where work was being performed by the responding party on the application date. Therefore the Board further finds, on agreement of the parties and pursuant to section 158(1) of the Act, that all painters and painters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the responding party in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

7. For the purpose of clarity the Board finds that drywall tapers are included in the bargaining unit.

8. The applicant claimed there were 8 employees at work in the bargaining unit on the application date. The responding party disagreed with the applicant's estimate and stated there were 6 employees at work in the bargaining unit on the application date. The responding party filed a list of 16 employees in which it indicated that a number of persons (holding the drywall taper or paint/spray ceilings classifications) were not at work on the application date for a number of reasons. The responding party's list does indicate there were 6 persons at work in the drywall taper classification on the application date.

9. In applications for certification in the construction industry dealt with under section 128.1, the Board assesses the degree of membership among the employees who were at work on the application date in order to make the requisite determinations under section 128.1(4) of the Act. The Board does not normally look at who was at work on any other date. See section 128(2) of the Act as well as *Controltech Electrical Inc.*, unreported, Board File No. 1330-05-R, decision dated September 26, 2005, Q.L. cite [2005] OLRD No. 3847; *Ken Anderson Electric Inc.* [1996] OLRB Rep. Sept/Oct 846; *Smith's Construction Company Arnprior Limited*, [1984] OLRB Rep. Mar. 521; *Megatech Electrical Limited*, [1999] OLRB Rep. March/April 257;

Quadracon, [2000] OLRB Rep. Sept./Oct. 989; and *Colautti Construction*, (1986), 86 CLLC ¶14,065 (Ont. Div. Ct.).

10. This application was filed on Saturday February 25, 2006 by the applicant sending it to the Board by Priority Courier on that date. See Rule 24.2 of the Board's Rules of Procedure. Enclosed with the application documents was a Declaration Verifying Membership Evidence (Form A-74) signed by a business representative of the applicant but without the requisite information added to the form. The applicant's business representative who had signed the blank Form A-74, by letter filed with the Board on February 27, 2005 (the day the Board received the application material sent by Priority Courier) explained that he had not filled out the form properly, and that he was providing a properly completed Form A-74 that morning.

11. The applicant had not "filed" the Form A-74 with the application as the application had been filed by Priority Courier on February 25th while the Form A-74 was filed on February 27th. Despite the two different "filing" dates, the actual documents were physically in the Board's possession on the same date, February 27, 2006. In *N.G.P. Steel Inc.*, [2000] OLRB Rep. Jan./Feb. 100 the Board considered a situation in which the membership evidence and the application arrived at the Board on different dates, but had been "filed" on the same date. The Board wrote at page 101-02:

> If all of the material required for an application under Part VI of the Board's Rules is filed with the Board on the same day, then, in our opinion, that material is "included" with the application for purposes of Rule 131 of the Board's Rules of Procedure. It does not matter that the material physically arrived at the Board in separate envelopes, or at different times on the same day, or on different days, so long as all of the material was filed with the Board (pursuant to Rule 129) on the same date.

That same approach was used by the Board in *Glasrock Products Inc.*, Board File No. 4128-03-R, decision dated March 22, 2004, unreported, Q.L. cite [2004] OLRD No. 3811 in which the Board wrote:

> Rule 129 provides that an application in the construction industry sent to the Board by Priority Courier is filed on the day it was sent, as verified by the Post Office. Since all of the material in support of the application was filed with the Board on the same day, that is, it was either received by the Board or sent by Priority Courier on the same day, the Board is satisfied that the application included the membership evidence and Form A-74 when it was filed with the Board, notwithstanding that they were received by the Board on different days.

In this case, the application and the Form A-74 physically arrived at the Board on the same day even though they were "filed" with the Board on different days. While, as a strictly technical matter, the Declaration Verifying Membership Evidence (Form A-74) was not included with the application as is required by Rule 25.1, all of the documents required by Rule 25.1 to be included with an application for certification were actually received by the Board on the same day. There can be no prejudice to the responding party by the Board treating the Form A-74 as having been filed with the application since the Board was able to process this application in the normal fashion. Under these circumstances, where the application material and the Form A-74 were filed with the Board on different days, but received by the Board on the same day, it is, in my view, appropriate to exercise the Board's discretion under Rule 40.7 to relieve against the strict application of the Rules.

12. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant on the date the application was filed. The applicant filed membership evidence on behalf of six persons, four of whose names appear on the list of employees who the employer submitted were at work on the application date.

13. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.

14. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

15. The Board is satisfied that it should certify the applicant.

16. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> ...
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13) (a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;

Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades in respect of all painters and painters' apprentices in the employ of Balko Drywall Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all painters and painters' apprentices in the employ of Balko Drywall Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

18. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

1887-04-JD Canadian Office and Professional Employees Local 491, Applicant v. Canadian Union of Public Employees and Canadian Staff Union, Responding Parties v. Administrative and Technical Staff Union (ATSU), Intervenor

Jurisdictional Dispute – A jurisdictional dispute arose between COPE and the CSU over the assignment of "Network Administrator" work to an employee of CUPE – CUPE argued that the Network Administrator duties fell within the job descriptions for Clerk-Typist and Secretary under the heading "other duties as assigned" – COPE submitted that the employee in question should be reclassified as either a Technology Analyst or a Technical Assistant, both of which fell within the COPE bargaining unit – CSU and ATSU, as an intervenor on behalf of CSU, argued that the Network Administrator duties fell outside the COPE bargaining unit – Moreover, CUPE, CSU and ATSU were parties to an agreement in which work that falls within the ATSU bargaining unit at the National Office of CUPE will fall within the CSU bargaining unit if performed outside the National Office - COPE argued that no reliance should be placed on this agreement as they were not a party to it and that the jurisdictional dispute was only between itself, CSU and CUPE – The Board rejected COPE's argument, holding that reference must be made to the overall collective bargaining relationships – The Board relied on the factors of economy and efficiency, employer past practice and employer preference in declining to change the assignment of work – Work assignment confirmed

BEFORE: *Ian Anderson*, Vice-Chair

APPEARANCES: *Michael Klug, Brian Edgecombe* and *Sandy McNama* for the applicant; *Ronald A. Pink* for Canadian Union of Public Employees; *Beth Symes, Karen McNama, Devon Pervoy* and *Dave Mochan* for Canadian Staff Union; *Alison Dewar, Anne McGrath* and *Mariette Davis* and for the intervenor.

DECISION OF THE BOARD; March 2, 2006

1. This is a jurisdictional dispute between the Canadian Office and Professional Employees Local 491 ("COPE") and the Canadian Staff Union ("CSU"), as to the assignment of "Network Administrator"[i] work by the Canadian Union of Public Employees ("CUPE"), as the employer, to Sandra McNama, a member of COPE in CUPE's Ontario Regional Office ("ORO"). COPE filed this application under section 99 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The Administrative and Technical Staff Union ("ATSU"), which represents certain other employees of CUPE, intervened in support of CSU.

2. The parties filed witness statements pursuant to the Board's February 15, 2005 decision. No *viva voce* evidence was heard for reasons given orally on October 31, 2005. On the agreement of the parties, written submissions were filed subsequent to that date.

3. COPE filed witness statements from Sandy McNama, Wendy Lyon, Louise Armour, Louise Cholette, Barbara Dafoe, Jamy Brent, and Sandra Simard. All are members of what is now COPE. Dafoe, Brent and Simard perform, or performed, Network Administrator type duties in British Columbia, Alberta and Manitoba respectively. Lyon, Armour and Cholette were or are employed in CUPE's Information Technology ("IT") Department.

4. CUPE filed witness statements from Jim Costescu, CUPE's Human Resources Manager, Bill Gillis, CUPE's Head of Information Technology, Rob Cunningham, a Senior Officer – Technology, and Peter Douglas, Regional Director of the ORO at the relevant times, and now retired. Gillis and Cunningham are members of ATSU. Douglas was a member of CSU. CUPE's IT Department is part of CUPE's National Office ("NO") located in Ottawa. It depends on "contacts" in the Regional and Area offices to perform certain functions. McNama is the contact for the ORO. While both Gillis and Cunningham were able to comment on some aspects of McNama's work based on their contacts with her, both candidly conceded that their location in Ottawa meant that they could not comment on McNama's day-to-day performance of activities at the ORO located in Toronto.

5. ATSU filed witness statements from Sean Healy and Nelson Campbell. Both are members of ATSU and hold the classification of Technical Systems Support Specialist. Both are employed in CUPE's IT Department. Gillis and Cunningham described the role of Healy and Campbell as providing Level 2 helpdesk support. Healy and Campbell both candidly conceded that their location in Ottawa meant that they could not comment on McNama's day-to-day performance of activities at the ORO located in Toronto. Each provided a description of his typical duties and responsibilities. Campbell commented on the list of Network Administrator duties provided by McNama.

6. CSU filed a witness statement from Andre Lamoureux. Lamoureux has been an employee of CUPE for twenty years and is a member of the CSU executive. He described the history of jurisdictional disputes between CSU, ATSU and COPE.

The Work

7. McNama prepared a written description of her Network Administrator duties. CUPE and ATSU lacked direct knowledge of the Network Administrator work performed by McNama. CSU accepted McNama's description of her duties as accurate. Douglas, the Ontario Regional Director at the relevant time, and the person to whom McNama reported with respect to her Network Administrator duties, confirmed the accuracy of McNama's description of her duties. McNama's description of her duties, annotated with further clarification offered by McNama in her statement, is as follows:

> ***Network Administrator Duties***
>
> ***Ontario Regional Office***
>
> *Provide technical support for at least 80 employees of the Ontario Regional Office and various CUPE area offices.*
>
> - *monitor the performance of the network and preparation of tape*

back-ups (daily, weekly, monthly)

- *restore document files deleted in error.* McNama stated that this occurs maybe 5 to 15 times per year and, since March 2004 she has done this by following instructions provided by Cunningham at the NO.
- *bring down server when necessary.* The server in question relates to the ORO LAN, not the wide area network. McNama stated that this occurs 6 to 12 times per year. She stated:

  > The process of bringing the server down entails accessing the correct screen display through keyboard stroke, ensuring there are no open files when the server is brought down, typing in "down", "yes" to continue and turning off the server computer. There have been many occasions where simply typing "down" would not work, and although not complicated other steps need to be done in order to accomplish the task.

- *set up User Files in the Network and assign rights to files for all staff (this can be a very time consuming job as staff changes occur often).* McNama stated that she, or in her absence the Admin. Assistant, accomplishes this by signing into the computer system as the "admin" and then:

  > … hit the Console 1 icon, go through the appropriate drop down menus, until ultimately I can, for instance, add a user, create a folder and assign files to different folders.

- *set up users on both desktops/laptops*
- *call national office to have e-mail accounts set up and setting up the e-mail account locally.* The latter involves 13 discrete steps (e.g. typing in the full name of the new user) within Microsoft Outlook which McNama has documented and described in a "Network Administrator Manual" that she has created.
- *installation of software applications on desktops and laptops (not server)*
- *replace hard drives*
- *responsible for the moving of laptops from one rep to another when their assignments change, as well as keeping track as to who has what laptop*
- *responsible of* [sic] *picking up and moving of laptops from CUPE area offices*
- *troubleshooting with printing, word, excel and any other software applications*
- *assist with the set up and use of the dial-up networking*
- *review back up tapes to ensure back up completed successfully*

- *provide training to all staff on how the LAN operates, and e-Mail training*
- *assist when staff are having problems with word/excel documents*
- *ongoing maintenance of common files (e.g. forms or template documents) that are available to all staff*
- *put in additional RAM*
- *put in new CD ROM drives*
- *constantly taking calls for either e-mail, word or networking problems, basically any problems with laptops/desktops staff will call me not only in the regional office, CUPE Ontario Division, and the CUPE area offices as well*
- *order supplies for desktops/laptops i.e. keyboard, mice, monitors and any special requests*
- *place service calls when problems arise with the laptops or desktops that can't be fixed in office.* McNama stated that she stopped doing this when "Micro-Nitro" became responsible for helpdesk functions at the NO. According to Cunningham, "Nitro MicroSystems had assumed these helpdesk functions at the beginning of 2002. Accordingly, NcNama was not performing this function during the relevant period of time.
- *load operating system when required*
- *install printer drivers on laptops/desktops*
- *have been called at home number of times with computer problems staff may experience*
- *backup data for reps on their laptops*

8. It is important to note that the "network" McNama assists in administering is a local area network (LAN) that operates only within the ORO. Similarly, the "server" she performs work on relates to the LAN. As discussed below, CUPE has been developing a wide area network (WAN) that is administered from the NO. McNama has no involvement in the administration of the WAN or any knowledge of how it operates.

9. The Network Administrator duties have evolved over time, and continue to evolve. This application, however, was filed on September 1, 2004, and, for reasons stated in the Board's decision dated February 15, 2005, this decision addresses the proper assignment of the work that was performed in the performance of those duties during the period February 1, 2004 to February 1, 2005.

Factual Context

10. As noted, McNama works in the ORO. At the ORO, CUPE employs a Regional Director, Assistant Regional Directors and National Representatives (50 to 60 individuals in all), all of whom are members of CSU, and approximately 20 members of COPE who are engaged in clerical, secretarial and administrative tasks.

11. McNama's involvement with CUPE's IT functions began in 1999 with the introduction of the LAN to the ORO. At that time, she held the classification of Clerk-Typist, which falls within the COPE bargaining unit. She was approached and asked if she would take on the unique set of duties relating to the maintenance and monitoring of the ORO's Local Area Network ("LAN"). She agreed. There was no posting and no change in her classification as a result of performing these duties. In 2000, she applied for and obtained a posted position as a Secretary, which also falls within the COPE bargaining unit. This remains her current classification. She continued to perform duties related to the maintenance of the LAN, and began to perform other clerical and service functions related to IT at the ORO, and to some extent Area Offices in Ontario. Since at least September 2001, the term "Network Administrator" has appeared next to McNama's name on the clerical staff assignment sheets for the ORO to denote the fact that she has been assigned these various IT functions.

12. At all material times, McNama was the only person at the ORO assigned to perform the Network Administrator duties. They occupied approximately 65% of her time during the relevant period of time. The remaining 35% of her time was occupied performing typical secretarial functions for a CSU member employed at the ORO. In the event of a conflict between the demands of her Network Administrator duties and her secretarial functions, another COPE bargaining unit member will typically perform McNama's secretarial functions.

13. CUPE's position is that the Network Administrator duties fall within the job descriptions for Clerk-Typist and Secretary under the heading "other duties as assigned". COPE disputes this, and has filed a grievance asserting that McNama should be reclassified as either a Technology Analyst, or failing that a Technical Assistant, both classifications within the COPE bargaining unit. CSU, and ATSU, as noted, take the position that the Network Administrator duties fall outside the COPE bargaining unit.

14. CUPE's use of IT has evolved over time to reflect the changing technology. First it made use of stand-alone PCs. Then it developed a network of largely independent LAN's. More recently it has been implementing a WAN that has resulted in the LAN's becoming interdependent. The shift from stand alone PCs to an interdependent WAN brings with it a requirement for standardization of hardware, software and programs. Thus, for example, clone PCs, serviced and modified by CUPE staff on site, were replaced by Dell PCs under warranty which may only be serviced or modified by certified technicians. The fact that a change implemented to the system in one office can propagate throughout the entire WAN, also gives rise to many security, confidentiality and technical stability concerns. CUPE has responded to these concerns by restricting "network administrator" privileges to only a few individuals in the IT Department at the NO.

15. Conversely, the WAN also permits central control from the NO of computers in the Regional Offices (RO's) and Area Offices, through the implementation of Activity Director and Track IT remote manager. This software product allows IT staff to remotely log into an individual desktop enabling all but physical remote support of an individual's computer. Gillis stated that to have Active Directory and Track IT remote manager running on a remote site server that is part of CUPE's wide area network (WAN) means:

> 1. The server itself is fully controllable by authorized staff at the National Office. It can be re-booted, patches

> applied, upgrades applied, login script changes, user accounts added / modified / deleted. We can do everything except things that require physical intervention – i.e. pushing the button, plugging it in or changing tapes.
>
> 2. Virus protection is centrally controlled and monitored at National Office and updates automatically applied. This setup also allows us to "push out" updates and even install applications remotely through the server to the desktop or laptop.
>
> 3. The Track IT program, which is installed through a login script change established by the IT Department at National Office, automatically inventories the PCs and sends that information back to a centralized database. Therefore, we have a complete picture of what the PC looks like including what applications are installed, what patches were applied and what particular hardware components are installed. Beyond that, Track IT remote allows IT staff at National Office to take a helpdesk call from someone in Edmonton, for example, and then take remote control of their PC to fix the problem or demonstrate how to perform a particular task.

16. The implementation of Activity Director and Track IT thus has the potential to reduce the need for a contact person to be on site at CUPE's RO's and Area Offices to provide this kind of support in person. Indeed, Simard, the Network Administrator at the Manitoba Regional Office stated that the implementation of Activity Director at that office has meant that: "almost all of my computer support-related duties are gone".

17. These changes have been accompanied by the development of an increasingly sophisticated IT Department located in the NO which, among other things, has taken over some of the support functions previously provided by external contractors and by staff located in RO's and Area Offices. The roles of the various staff employed by the IT Department have also shifted over time, reflecting both the changes in IT systems and changes in the way in which the IT Department has structured itself as it grows and takes on new functions.

18. Of particular relevance has been the manner in which "helpdesk" functions have been performed. Gillis provided the following description of "helpdesk":

> IT support is provided to individual employees through a "helpdesk" system that allows any individual employee to call someone when they experience hardware or a software problem. Initially, we try to assist the individual to resolve the problem themselves through instruction over the phone. If this does not remedy the situation the helpdesk may do a desk side visit or call a contractor/vendor to provide on-site service.

> ....
>
> The typical Industry Standard for helpdesk services sets out three levels. Specifically, level 1 typically involves telephone support with a scripted response for basic issues. At this level the individual typically takes and records a call and assists individuals with basic issues that arise. They typically do not provide a walkup maintenance function. More complex technical issues are usually forwarded to level 2 where more advanced hardware and software diagnosis can be performed. Level 2 also usually provides the desk side visits to assist individuals, installs hardware and software and addresses various other hardware and software issues that may arise. Finally, level 3 helpdesk service provides responses to much more complex and far reaching issues. This level may also provide guidance or direction for those employees performing level 2 or level 1 functions.

19. There is no dispute that up until 2001 or 2002 Lyon and Cholette, both members of COPE, provided Level 1 helpdesk functions as members of the IT Department at the National Office, while holding the classification of Technology Assistant. (Lyon went off on maternity leave in 2002, and when she returned in 2003, she was told that her position had been eliminated. The helpdesk type functions have been removed from Cholette's position.) Since that time, Healey and Campbell, both members of ATSU, have performed those functions as members of the IT Department at the National Office, while at the same time providing Level 2 helpdesk functions.

20. The implementation of IT changes in CUPE's various offices has taken place over time: clone PCs were gradually replaced with Dell PCs; Activity Director and Track IT remote manager were fully implemented first as a pilot project in one Area Office and then over time in other Area Offices and RO's. Critically, as of February 1, 2005, these changes had not been fully implemented in the ORO. The ORO continued to have clone PCs until early March 2005. Indeed, Cunningham stated that by the beginning of February 2005 "the majority of computer hardware in the Ontario Regional Office had yet to be replaced with new Dell machines".

21. Further, while an initial component of Active Directory to enable remote and automatic management of virus protection was put in place in the ORO in the fall of 2004, the balance of Activity Director and Track IT was not in place as of February 1, 2005. Indeed, it is perhaps an indicia of the complexity of the situation that while Gillis indicated in his statement that CUPE was committed to having Activity Director and Track IT operational in all RO's by the end of June 2005, in fact this had not been accomplished in the ORO as of the date of the hearing of this matter on October 31, 2005.

22. I infer from the fact that there continued to be clone PCs in the ORO and that Activity Director and Track IT were not operational in the ORO by February 1, 2005, that up until that date McNama continued to perform hardware functions which would otherwise have been performed by Dell technicians on the one hand and software functions that would otherwise have been performed centrally from the NO on the other hand.

23. Further, McNama continued to have network administrator privileges with respect to the LAN until March 4, 2005. It appears, from the perspective of the CUPE IT Department, that this was a mistake: the fact that McNama had "network administrator" privileges was discovered as a result of an IT system audit, at which point her privileges were removed and she was advised that because of the potential for any change made by a network administrator to be replicated throughout the system, that only IT Department personnel in the NO were authorized to make such changes. Once again this highlights the complexity and rapidly evolving nature of IT systems: the IT Department was simply unaware that McNama had network administrator privileges. There is no suggestion that McNama had acted improperly in exercising network administrator privileges. More significantly, however, for the purpose of this decision, there is no dispute that during the relevant period of time she was exercising certain network administrator privileges.

24. With respect to the degree to which McNama was performing software functions, the Board notes that Cunningham states that as early as 2001: "I could remotely manage the exchange of information on the local area networks and run commands and diagnostics on the server. At that that time I was unable to push out patches or upgrades. I was also unable to access the individual desktop machines at that time." (The ability to access individual desktop machines appears to have been the result of implementation of Activity Director and Track IT. As noted, these had not been fully implemented in the ORO by the end of the relevant time.) Cunningham also stated that in his view, based on McNama's description of her duties, he considered that she was performing a function very similar to that provided by Lyon at the National Office in 2001, that is providing some lower level helpdesk support and providing some walk-up support.

25. CSU rejects the proposition that the Network Administrator duties performed by McNama are most closely aligned with those of Lyon when she was classified as a Technology Assistant. It advances three arguments in support of its position. Two of these are addressed within the context of the analysis given below. It is convenient to address the third argument at this time. It is that "McNama's duties are broader and in more depth than those performed by Lyons [sic]".

26. Lyon stated that the majority of her duties were acting as a Level 1 helpdesk for employees at the NO. Her functions in relation to PCs mirrored, in many respects, those of McNama: installation, and re-installation of software; installation of hardware on PCs; setting up email accounts; troubleshooting Word etc. problems; and informal basic training with respect to use of software and hardware.

27. Unlike McNama, Lyon did not perform clerical functions related to keeping records with respect to assignments of computers, although she was responsible for ordering of supplies. Nor was part of her role to maintain common files (e.g. forms which were to be available to all users as "read only" documents) on the system. In my view, however, these are purely clerical functions that do not advance CSU's position that the work performed by McNama was more technical or complex than that of Lyon.

28. Lyon also did not perform any functions in relation to the LAN at the NO, or the WAN. More specifically, she did not perform the following functions performed by McNama:

monitor the performance of the network; preparation of back-up tapes for the LAN server; bringing down the LAN server when necessary; and setting up user files on the network and assigning rights to those files. Once again, the fuller description of these activities provided by McNama in her statement do not advance the position of CSU that they were more complex or technical than those performed by Lyon. Monitoring the performance of the network involves accessing a screen display on the server through a series of keystrokes. Preparation of back up tapes involves inserting a back up tape in a tape drive and performing a series of keystrokes. Bringing down the LAN occurs 6 to 12 times per year and involves typing "down" and "yes", or, on some occasions other "not complicated" steps. McNama's description of the process of setting up user files and assigning rights to those files, set out above, is also of a fairly routine function: it is noteworthy in this respect that this function is performed by the "Admin Assistant" in McNama's absence. These tasks are not sufficiently more complex so as to distinguish them from the other tasks performed by McNama, and Lyon.

29. The other distinguishing feature between Lyon and McNama is that while McNama's statement indicated that it was not unusual for her to get calls at home during the relevant period, Lyon's statement is silent with respect to whether she received calls at home.

Analysis

30. Within the context of the construction industry, the Board has developed a list of factors it considers in resolving jurisdictional disputes. In *Pioneer Manor – Home for the Aged v. ONA*, [1993] OLRB Rep. May 447 the Board set out the factors typically considered by the Board as follows:

> [15] In assessing the merits of jurisdictional disputes, the Board has traditionally considered a number of criteria, including the following:
>
> (a) collective bargaining relationships,
> (b) skill and training,
> (c) safety
> (d) economy and efficiency,
> (e) employer past practice
> (f) area or industry practice
> (g) employer preference.

31. These factors are not to be used mechanically, in particular when applied outside of the construction industry. As stated by the Board in *Kingston General Hospital* [1999] OLRB Rep. Mar./Apr. 227, at paragraph 45:

> In these circumstances; it is appropriate to review those factors which seem relevant to the facts of the present conflict, while being cautious not to take a too rigid approach to the principles developed in the earlier jurisprudence.

Collective Bargaining Relationships

32. The recognition clause in COPE's collective agreement, at Article 2.01, provides that COPE is the exclusive bargaining agent for all "employees of the Employer doing office and clerical work…whose duties fall within the classifications listed in Schedule "A", save and except

… those employees covered by the Collective Agreements between the Employer and the Administrative and Technical Staff Union, the Canadian Staff Union….” The classifications listed in Schedule “A” include “Secretary”, “Technology Analyst” and “Technology Assistant.”

33. The recognition clause in the CSU collective agreement, also at Article 2.01, provides that CSU is the exclusive bargaining agent for “all employees of the Employer, save and except … those employees covered by the Collective Agreements between the Employer and (a) Administrative and Technical Staff Union; (b) the Office and Professional Employees International Union, Local 491 [now COPE]”.

34. COPE argues that the scope of the CSU collective agreement is defined solely in negative terms and is devoid of meaning. Since it excludes employees covered by, *inter alia*, the COPE collective agreement, the CSU agreement excludes those employees doing office and clerical work whose duties fall within the classifications of secretary, technical assistant or technology analyst. It argues that the Network Administrator work falls within these duties. By contrast, it argues, there are no classifications under the CSU collective agreement which could cover the Network Administrator work and no evidence that any member of CSU has done the work.

35. COPE argues that as this is a jurisdictional dispute between itself and CSU any reference to whether the work is or might be done by ATSU is irrelevant. I agree that in the first instance, the question is whether both COPE and CSU can independently lay claim to the work in question. Such independent claims are the source for the competing claims to jurisdiction which give rise to the dispute. I also accept that each union’s jurisdictional claim must be based on the recognition clause in its own collective agreement. The question of whether the work is or might be done by ATSU, however, is not irrelevant. COPE’s claim that CSU has no jurisdiction over the work is predicated on the assertion that it has exclusive jurisdiction over certain work, which work in turn must be subtracted from CSU’s “all employee” bargaining unit in order to define the jurisdiction of CSU. Logically a claim of exclusivity must be defended against all comers, which therefore includes ATSU.

36. CSU, on the other hand, argues that McNama is not doing “office and clerical work” and that in any event COPE’s recognition clause restricts it to claiming work of those within the listed classifications. The potentially relevant classifications listed in Schedule “A” to the COPE collective agreement are “Secretary”, “Technology Analyst” and “Technology Assistant”. It argues that the Network Administrator duties do not fall within these categories. CSU argues that neither its collective agreement nor that of ATSU contains a similar restriction. Therefore, it asserts, the Network Administrator work falls within its bargaining unit.

37. CSU argues that the Network Administrator duties performed by McNama are not “office and clerical” and do not fall within the job duties of a Secretary as described in Posting No. 01-14, the position for which McNama successfully applied in order to obtain her current classification. CSU also argues that the vast majority of the Network Administrator duties do not fall within the job duties of a Technology Assistant as described in the job postings for the positions for which Armour and Cholette successfully applied in order to obtain their current classifications, or the job posting for the position formerly held by Lyon. (For that matter, CSU argues that neither Armour nor Cholette are performing the duties of a Technology Assistant as described in those postings.)

38. The meaning to be given to the term "employees doing office and clerical work" under the COPE collective agreement is informed by the classifications listed in Schedule "A" to that agreement. Schedule "A" lists wage rates for the following classifications (grouped by shared pay rate, in descending order): Administrative Assistant, Research Assistant, Technology Assistant, Job Evaluation Assistant, Legal Analyst, Wage & Salary Analyst, and Senior Collective Agreement Analyst; Bookkeeper I; Executive Secretary, Senior Secretary, Technology Analyst, Collective Agreement Analyst and Information Clerk I; Personnel Clerk and Bookkeeper II; Information Clerk; Secretary (1-clerical office); Purchasing and Receiving Clerk; Secretary; Clerk-Typist (1-clerical office) and Statistical Clerk-Typist; Clerk-Typist, Receptionist Clerk-Typist, Receptionist and Machine Operator. These classifications suggest that the COPE bargaining unit is not limited to employees doing purely clerical work within the office, but includes some other employees doing office work.

39. CSU's argument also equates the duties of the classifications for the purposes of the scope clause of the COPE collective agreement with the job duties set out in job postings. There is no basis for this equation. The COPE collective agreement does not contain descriptions of the classifications listed in Schedule "A" or written job descriptions. CUPE, as the employer, unilaterally determined the duties in the job posting. The duties in the job posting are not determinative of the scope of the bargaining unit agreed to by COPE.

40. By contrast, CSU argues, that there is a substantial overlap between the Network Administrator duties and the duties set out in the posting for a Technical Systems Support Specialist ("TSSS") at the NO. The TSSS hold the classification of Administrative Officer within the ATSU bargaining unit. CSU points out that the two TSSS's, Healy and Campbell, state that they do all but the purely clerical Network Administrator duties performed by McNama. CSU also asserts that McNama's Network Administrator duties are comparable to the duties that Healy and Campbell state they typically perform.

41. It is noteworthy that while both Healy and Campbell specifically stated that they perform most of McNama's Network Administrator duties, neither suggested that she performs most of their typical duties. In my view, the evidence does not support CSU's assertion that McNama's Network Administrator duties are comparable to the duties that Healy and Campbell state they typically perform. For example, contrary to the assertion of CSU, creating a "ghost image" for the purposes of rebuilding and redeployments of desktops is not the same as using the ghost image supplied.

42. More fundamentally, CSU's attempt to compare the duties of McNama with those of Healy and Campbell generally requires that functions that McNama performs or performed on stand alone PCs or the LAN be equated with functions performed on the WAN. This equation ignores the fact that the WAN is more complex than PCs or the LAN and the consequences of mistakes much more grave. By way of illustration, CSU attempts to equate McNama's role of setting up users and email accounts on the LAN with Campbell's function of creating and troubleshooting user email accounts on the WAN. The greater complexity of the WAN is reflected, however, in the fact that Campbell has indicated that he can only do this function with permission from a "Senior Officer", i.e. Gillis or Cunningham.

43. CSU also fails to address the evidence of Gillis and Cunningham that the level of assistance provided by Healy and Campbell is more complex than the level of assistance provided by McNama, as discussed further below. Finally, it fails to address the evidence of Gillis that he interviewed McNama for a TSSS position in 2004: he determined that she did not have the requisite skills for the TSSS position, and she agreed. McNama herself stated that she has no knowledge in any detail of how the WAN works

44. ATSU takes the position that the issue is whether the Network Administrator duties performed by McNama are, in form and substance, equivalent to the duties being performed in the National Office by ATSU members in TSSS positions or the duties currently being performed by Cholette, the COPE member in the Technology Assistant position. CUPE, CSU and ATSU are parties to an agreement that provides that work which falls within the ATSU bargaining unit at the NO will fall within the CSU bargaining unit if performed outside the NO. If the Network Administrator duties are equivalent to the duties performed by ATSU members, then ATSU relies on the agreement between CUPE, ATSU and CSU and argues that since McNama performs the Network Administrator duties in the ORO, they properly fall within the jurisdiction of CSU. CSU joins ATSU in advancing this argument.

45. ATSU relies on the fact that the computer service functions formerly performed by the COPE members Lyon, Armour and Cholette were transferred to the two Technical Systems Support Specialists (TSSS), Campbell and Healy, both ATSU members, prior to the relevant period: the positions of Lyon and Armour were eliminated completely and the work of Cholette was changed so that she now only does clerical functions, such as maintaining lists and keeping records, in relation to CUPE's IT systems. It notes that there is no dispute that the TSSS positions are properly within the jurisdiction of ATSU and that the clerical duties performed by Cholette are properly within the jurisdiction of COPE. It asserts that COPE did not dispute the re-assignment of the computer service functions formerly performed by Lyon, Armour and Cholette to the TSSS positions.

46. ATSU argues that the key distinction is that Cholette performs clerical support for the computer services and the TSSS positions "perform computer services functions in all of its forms". It argues that McNama's Network Administrator duties are in substance and form equivalent to the computer services functions performed by the TSSS, and states "any differences in the duties can be attributed to the differences between computer needs (for example LAN and WAN) on [sic: in] the national office and the ORO". In the result it argues that McNama's Network Administrator duties, if performed in the National Office, would fall within the jurisdiction of ATSU. On this basis it argues that since McNama's Network Administrator are performed in the ORO, they fall within the jurisdiction of CSU.

47. This argument of ATSU, and the similar argument made by CSU, rests in part on the proposition that in determining which union should be assigned jurisdiction with respect to the work performed by McNama during the relevant period of time, comparison may be made only to work performed by others during the same period of time. There is no basis for this proposition. Indeed, as acknowledged by all of the parties, one of the criteria that the Board has typically considered in determining jurisdictional disputes is the employer's past practice.

48. Nor is the distinction between computer service functions related to a LAN and computer service functions related to a WAN immaterial, as implicit in the submissions of ATSU.

A WAN is a more complex interdependent system, and the larger number of PCs connected to the WAN, and greater degree of control exercised over those PCs through the WAN, make the consequences of an error much more significant. Cholette herself recognized the greater complexity of the system now in use at CUPE's National Office compared to the system on which she used to provide computer service functions and stated that she was no longer comfortable in performing certain computer service functions in relation to that system. McNama was very clear in her statement that she has no involvement in the administration of the WAN and that she was "not aware in any detail at all of how it operates".

49. Nor can all "computer services functions" be equated in the manner suggested by ATSU. The hierarchy of helpdesk functions described in the evidence of Gillis and Cunningham clearly illustrates, for example, that varying levels of assistance may be required to assist computer users with questions or problems related to computer use. Level 1 helpdesk, Level 2 helpdesk and Level 3 helpdesk all provide assistance to computer users, but Level 1 is not capable for providing the kind of assistance provided by Level 3, or for that matter Level 2. Conversely, Level 3 is capable of providing the kind of assistance that Level 2 or Level 1 provides and Level 2 is capable of providing the kind of assistance that Level 1 provides. In fact, that is precisely what happened at CUPE: the Level 1 helpdesk functions previously performed by Lyon, and to a lesser extent Armour and Cholette, are now being performed by Healey and Campbell along with the Level 2 helpdesk functions.

50. The fact that ATSU members are now performing the Level 1 helpdesk functions at the National Office formerly performed by COPE members does not give ATSU an exclusive claim to that work if performed at the National Office, any more than COPE members have an exclusive claim to performing these functions. The ATSU members perform those functions in their capacity as Level 2 helpdesk. It would be unrealistic and artificial to suggest that at any point advice a Level 2 helpdesk was giving became routine a call had to be transferred to a Level 1 helpdesk: such logic would require that a given call be transferred back and forth between Level 1 and Level 2 depending on whether a particular question or step during the call was routine (e.g. turn on the computer) or more complex.

51. It follows that both COPE and ATSU can lay claim to performing Level 1 helpdesk work at the National Office. Whether the particular work should be assigned to COPE or ATSU would depend on the specific circumstances. Presumably, for example, if one person were assigned to perform purely Level 1 helpdesk functions, then all other things being equal, the work would be assigned to COPE. That issue, however, is not before the Board.

52. As noted, CUPE, CSU and ATSU are parties to an agreement that provides that work which falls within the ATSU bargaining unit at the NO will fall within the CSU bargaining unit if performed outside the NO. COPE objects to any reliance being placed on this agreement, both because it is not a party to the agreement and because this is jurisdictional dispute only between itself, CSU and CUPE. In my view, this latter submission is not persuasive. If both COPE and CSU can lay claim to the work in question, then the Board must determine to which the work should be assigned. At this point, reference must be had to the overall collective bargaining relationships not only between CUPE, COPE and CSU but also ATSU. It would make no labour relations sense for the Board to exercise its discretion in this case in a manner which did not recognize the interlocking nature of all of these relationships. Having said that, even relying on the agreement, CSU can lay no greater claim to the work than ATSU, and, for the reasons stated,

ATSU's claim that the work in question is properly within the exclusive purview of its members fails.

53. The evidence establishes that the Network Administrator duties performed by McNama at the relevant time consisted of some purely clerical functions in relation to the IT system in the ORO, some helpdesk functions, at a Level 1 level, some network administrator functions in relation to the server for the LAN, but notably not the WAN, and some "walk up" functions in relation to clone PCs. While the hierarchy of helpdesk functions described by Gillis locates "walk up" functions at Level 2 helpdesk, it is noteworthy that on the evidence the "walk up" functions performed by McNama were similar to the "walk up" functions that had been performed by Lyon when she was a Technology Assistant in the IT Department. There was no dispute that Lyon was properly within COPE at the time that she was performing those functions. But it is also the case that many of these functions could be performed by ATSU members, and indeed now are. It follows that while COPE's collective bargaining relationship with CUPE allows it to lay a claim to the work, it is not an exclusive claim that defeats any claim by CSU.

Skill and Training

54. COPE argues that there is no evidence that members of CSU have the skill or training to do the work. In my view, the criteria of skill and training are of limited assistance within the context of this case. As noted, this, and the other traditional criteria emerge from jurisdictional disputes in the construction industry. In the construction industry, bargaining rights are defined by reference to trades that have more or less unique sets of skills. These trades, in turn, are members of the union that typically has a function in supplying labour through a hiring hall. While the criteria of skill and training might be of assistance in an non-construction setting, where bargaining rights were based on craft units or in some other manner defined with reference to uniquely skilled job positions, it is of limited assistance in this case where CSU has an "all employee" bargaining unit.

Safety

55. There is no suggestion that safety is a consideration in this case.

Area or Industry Practice

56. Area or industry practice is not a consideration in this case.

Economy and Efficiency

57. During the relevant period of time, the Network Administrator duties occupied 65% of McNama's time. There was no dispute that the other 35% of McNama's time was spent doing clerical work that properly belonged in the COPE bargaining unit. There is no evidence that the work could be combined with other work in the CSU bargaining unit, or otherwise done within the CSU bargaining unit in an economical or efficient manner. Economy and efficiency therefore favour allocating the work to the COPE bargaining unit.

Employer Past Practice

58. The evidence of employer past practice with respect to the allocation of the work within the ORO was reviewed above within the context of the discussion of collective bargaining relationships. This evidence establishes that the employer's past practice has been to allocate work of this nature, when largely divorced from Level 2 helpdesk functions, to the COPE bargaining unit.

Employer Preference

59. To be given weight, employer preference must be grounded in valid labour relations or operational business concerns. In its submissions, CUPE stated:

> In this case, CUPE has a clear preference to assigning the work in question to the COPE bargaining unit. This preference is related to the efficiency and economy related to this assignment, the fact that the skill and amount of work in this area will continue to decrease with the continued evolution of the IT infrastructure at CUPE, and because, in its view, this work can be carried out satisfactorily by members of the COPE bargaining unit, as it continues to be across Canada, as part of the extra duties of clerical employees.

60. In my view, this is a fair synopsis of the evidence, and constitutes valid labour relations and business concerns.

Conclusion

61. For reasons of economy and efficiency, employer past practice and employer preference, I decline to change the assignment of the work in question, as performed during the period February 1, 2004 to February 1, 2005, from COPE to CSU.

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[1] The phrase or term "network administrator" is used in a variety of ways in these proceedings. First, "Network Administrator" is the term used on the clerical staff assignment sheets for the ORO to denote the fact that McNama has been assigned various IT functions. Those functions are the work that is the subject of this application and will be discussed in greater detail below.

Secondly, the phrase "Network Administrator" is used in a Memorandum of Agreement dated November 12, 2002 between CUPE and CSU in the following context:

> CUPE will consider the creation of a CSU classification(s) as part of the implementation of its I.T. Strategic Plan.
>
> CUPE commits that they will not amend existing job descriptions/classifications in or create new classifications to reflect "Network Administrator" duties or any matter related to computer systems without first allowing CSU the opportunity to take steps to have the work included in the CSU bargaining unit.
>
> The I.T. Office, in conjunction with Regional Directors, will explore ways to improve the technology support provided to the regions, including the possibility of having a

> dedicated technical resource located in key Regional Offices reporting both to the Regional Director for day-to-day activities as well as to ensure standards are met.
>
> Upon implementation of the recommendations respecting dedicated technical resource personnel in Regional Offices and regional technical resource personnel in regions as set out in the CUPE I.T. Strategic Plan of September 2002, it is agreed that those positions/classifications which would be ATSU bargaining unit positions/classifications if the positions were at National Office will be positions/classifications in the CSU bargaining unit, in the Regions.

While ATSU is not a party to this Memorandum of Agreement, it is common ground as between ATSU, CSU and CUPE that positions/classifications which would be ATSU bargaining unit positions/classifications if the positions were at National Office will be positions/classifications in the CSU bargaining unit, in the Regions. COPE, which is also not a party to the Memorandum of Agreement, does not accept that CSU's jurisdiction in the Regions mirrors the jurisdiction of ATSU at the National Office: it asserts that CSU's jurisdiction is limited to staff in the Regions who represent CUPE members in public fora.

Third, Rob Cunningham, who holds the classification of Senior Officer – Technology and is part of CUPE's IT Department based in the National Office, stated that he has overall responsibility for CUPE's WAN, and as such he is "the only network administrator for CUPE, although not in a job description that refers to it".

Fourth, the term "network administrator" is commonly used in certain IT applications to denote a person who has the authority and ability (sometimes referred to as "privileges") to make certain changes to a LAN or WAN. Thus a "network administrator" is someone who performs this function.

In this decision, unless the context otherwise demands it, "network administrator", all lower case, is a reference to the authority or ability to make changes to a LAN or WAN, while "Network Administrator", with initial capitals, is a reference to the label which was given to the various IT tasks performed by McNama at the ORO, which, included, but were not restricted to, certain "network administrator" functions with respect to the LAN.

3205-05-M **Evans Lumber and Builders Supply Limited**, Employer v. Warehousemen, Transportation and General Workers Union, Local 715, Union

Conciliation – Reference – The Minister asked whether he had the authority to appoint a conciliation officer, where the union gave the employer notice to bargain eight years after the collective agreement, containing no renewal clause, had expired – The employer did not assert that the union had abandoned its bargaining rights – The Board found that while s. 59(1) precludes notice from being given until the final 90 days of the collective agreement, it does not provide that notice may only be given in the final 90 days – Therefore the notice of intent to bargain was a valid s. 59(1) notice – The Board's advice to the Minister was that he had the authority to appoint a conciliation officer

BEFORE: *Ian Anderson*, Vice-Chair, and Board Members *R. O'Connor* and *L Wood*.

DECISION OF THE BOARD; April 13, 2006

1. This is a Ministerial reference under section 115 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, as amended (the "Act").

2. On December 19, 2005, the Minister referred the following question to the Board for advice:

> Did the Minister of Labour have the authority to make the requested appointment of a conciliation officer?

3. The facts giving rise to this reference are as follows:

> 1. The union is the bargaining agent for certain employees of the employer. The last collective agreement between the parties expired on either March 15, 1995 (according to the employer) or March 15, 1997 (according to the union). The collective agreement does not contain an automatic renewal clause.
>
> 2. The employer continued to pay dues to the union on behalf of at least one employee in the bargaining unit. On June 23, 2005, the union filed a grievance concerning non-payment of dues with respect to the balance of the employees. In September 2005, the employer agreed to resolve the grievance on a without prejudice basis and began remitting and deducting dues. The employer is not asserting that the union abandoned its bargaining rights.
>
> 3. By letter dated October 12, 2005, the union purported to give the employer notice of "its desire to enter into negotiations for the revision and renewal of the existing collective agreement".
>
> 4. On October 17, 2005, Labour Management Services ("LMS") received a request from the union for the appointment of a conciliation officer pursuant to section 18 of the Act with respect to renewing a collective agreement. The union's request indicates that it was seeking the renewal of a collective agreement expiring on March 15, 1997, and that written notice to bargain had been given to the employer on October 12, 2005.
>
> 5. By letter dated October 20, 2005 to the union and the employer, LMS indicated that the union's request would be processed provided that no valid objection was received from the employer.
>
> 6. Since no objection was received within five days (which is an internal administrative timeline of LMS), a conciliation officer was appointed by letter from LMS dated November 2, 2005.
>
> 7. On November 24, 2005, an application for termination of bargaining rights was filed with the Board: File No. 2882-05-R.
>
> 8. By decision dated December 7, 2005, the Board dismissed the application for termination of bargaining rights on the basis that the appointment of a

> conciliation officer by the Minister pursuant to section 18 of the Act rendered the application untimely.
>
> 9. The employer has requested that the Minister "reconsider" his decision to appoint the conciliation officer.

Analysis

4. Sections 18(1) and 59(1) of the Act provide as follows:

> **18.** (1) Where notice has been given under section 16 or 59, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> ***
>
> **59.** (1) Either party to a collective agreement may, within the period of 90 days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

5. The employer argues that the purpose of section 59 is to "encourage parties to engage in negotiations in a timely fashion prior to the expiry of the collective agreement" and to provide stability in labour relations. It accepts that the Board has found that the time limit under section 59 is directory, not mandatory. It also accepts that section 18 is mandatory.

6. The employer states that if a party, in this case the union, gives notice to bargain within the last ninety days of the collective agreement, that party can "compel" the Minister to appoint a conciliator. If, on the other hand, notice to bargain is given after the expiry of the collective agreement, then, it argues, the Minister "should not, indeed must not, be compelled to appoint a conciliator". The employer argues that the Minister has discretion under section 59 of the Act to decide whether or not to accept notice of intention to bargain provided after the expiry of a collective agreement as valid. The employer asserts that a number of factors are relevant to the exercise of this discretion: the length of the delay; the interest of the employees in the bargaining unit in pursuing a termination application; and the stability of labour relations. It argues that in this case consideration of those factors means the Minister should not have made the appointment of the conciliation officer. The employer relies upon *Danver Ambulance Service Inc.*, [1985] OLRB Rep. June 833, to argue that the Minister has discretion with respect to extending time limits under section 59, but that such an extension should only be for a "few days"

7. The Board notes that the employer's argument rests on the assertion that the statute treats notice given within the last ninety days of a collective agreement differently from notice given thereafter: in the former instance the Minister is compelled to appoint a conciliation officer under section 18; in the latter instance the Minister must first exercise a discretion to extend time limits under section 59(1).

8. The question referred by the Minister was whether he had the authority to make the requested appointment of the conciliation officer. Even accepting the employer's argument as correct necessarily results in the conclusion that the Minister did have the authority to make the appointment: if, as the employer argues, the Minister had discretion not to make the appointment,

it follows that he had the discretion, and hence the authority, to make the appointment. The Board does not have jurisdiction to tell the Minister how to exercise discretion conferred upon him by the Act.

9. More fundamentally, however, in our view the employer's argument misconceives the nature of the statutory scheme. Nowhere does the Act state that section 59(1) confers discretion upon the Minister. The giving of notice of intention to bargain under section 59(1) simply triggers a number of rights and obligations under the Act by virtue of section 60. Stability of labour relations requires that a party not be able to trigger those rights and obligations during much of the term of a collective agreement. Hence, section 59(1) precludes notice from being given until the final ninety days of the collective agreement. It does not, however, provide that notice may only be given in the final ninety days of the collective agreement. The opposite conclusion would leave the parties bound to a collective bargaining relationship which neither party could enforce and it would thereby frustrate the scheme of the Act.

10. This issue was reviewed in *Peel Memorial Hospital*, [1977] OLRB Rep. July 452, where the Board made the following statement, with which we agree:

> 27. Section 45 [now section 59] does not say that if either party wants to give notice to bargain it *shall* be within the ninety day period. The purpose of providing a limited period at the end of an agreement for the giving of notice to bargain is to provide stability between the parties for as much of the agreement as possible. At the same time, however, it is desirable to provide a sufficient time prior to the termination of the agreement to enable the parties to conclude, if possible and if desired, a successor agreement. Notice informs the other party and the public that negotiations will follow. Once notice is given certain rights, duties and obligations follow to enable the parties to carry out their negotiations.
>
> 28. .... If the parties were precluded from being able to give effective section 45 notice to bargain after their collective agreement has been terminated by circumstances far beyond their control, the purpose and scheme of the Act would be frustrated. A panoply of rights, duties and obligations under the Act is triggered by, and only by, the giving of effective section 45 notice to bargain. If section 45 notice cannot be given in these circumstances, then, the negotiation process as envisioned by the Act cannot be set into motion. Unless such notice is found to be effective under section 45 the parties will not be required to bargain in good faith; they will not be assured of an undisturbed atmosphere in which to commence their negotiations because they will become immediately subject to the possibility of displacement and termination applications; they will not be able to obtain the services of a conciliation officer and they will not be able to engage in a legal strike or lockout.
>
> 29. In view of the considerations set out above the Board finds that the time period set out in section 45 is directory not mandatory and that notice given after the termination of a collective agreement may be effective notice under section 45 of the Act.
>
> [Emphasis in original.]

(See also *Dravo of Canada Ltd.*, [1977] OLRB Rep. Sept. 568.)

11. The fact that the statute assigns the function of appointing conciliation officers to the Minister, rather than the Board, also supports the conclusion that the statute does not contemplate the exercise of discretion in the manner suggested by the employer. Unlike the Board, there is no provision under the Act for the Minister to conduct a hearing prior to deciding whether to appoint a conciliator. (We would note that while section 115 of the Act permits the Minister to refer a question to the Board for advice, it does not permit the Minister to delegate to the Board the role of deciding whether to appoint a conciliator. Further, the Board understands that in the vast majority of cases, the Minister decides whether to appoint a conciliator without seeking the advice of the Board.) In short, section 18 of the Act appears to treat the appointment of a conciliation officer as a purely administrative function, rather than one which requires the balancing of various factors in the manner suggested by the employer.

12. As noted, the employer relies upon *Danver Ambulance Service Inc.* In that case, the collective agreement provided for its automatic renewal if notice of intention to bargain was not given prior to its expiry. The panel concluded that notice of intention to bargain given by the union after the expiry of the collective agreement was not notice for the purposes of what is now section 59(1) of the Act for the simple reason that the collective agreement had been renewed: it was not the fact that notice had been given after the expiry of the collective agreement which precluded it from being valid, but rather the fact that notice was given midterm in the renewal collective agreement, and more precisely prior to the last ninety days of its operation. We agree with this reasoning.

13. Notwithstanding this conclusion the panel went on, by way of *obiter dicta*, to address the union's argument that the Board has discretion to find notice given after the expiry of a collective agreement complies with what is now section 59 of the Act. The panel appeared to accept that the Board had discretion to extend the period for notice under section 59, but stated that it would not do so because of the "considerable and inexcusable delay" by the union in the case before it in giving notice of intention to bargain.

14. If *Danver Ambulance Service* stands for the proposition that notice of intention to bargain given after the last ninety days of a collective agreement is not valid unless the Board exercises some discretion, then we respectfully disagree. We see no reference in section 59 to an exercise of discretion by the Board, nor is it apparent that such an approach is consistent with the analysis set out in *Peel Memorial Hospital*. In any event, *Danver Ambulance Service* does not state that the Minister has such discretion, as suggested by the employer

15. In the result, we conclude that notice of intention to bargain after the expiry of a collective agreement is valid notice for the purposes of section 59 without exercise of discretion by the Minister.

16. The statute is not without consequences for a union that delays in giving notice of intention to bargain. Such a union runs the risk of extending the period for a timely application for termination of bargaining rights by the employees in the bargaining unit pursuant to section 63 of the Act and also the risk of a timely application for termination or bargaining rights by the employees or employer pursuant to section 65 of the Act. On the facts of this case, either type of application would have been timely for many years prior to the union's notice of intention to

bargain and application for conciliation. Such a union may also run the risk of facing the argument that it has abandoned its bargaining rights.

17. Accordingly, we conclude that the notice given in this case complied with section 59 of the Act. There being no dispute that one of the parties requested the appointment of a conciliation officer, the advice to the Minister with respect to the question referred to the Board is:

> The Minister did have the authority to make the requested appointment of a conciliation officer.

1410-05-R Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Glasbau Hahn GmbH + Co. KG**, Responding Party

Certification – Construction Industry – Practice and Procedure – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Farah Baloo, Jim Vlahos* and *Jim Morris* for the applicant; *Andra Pollak* and *Barry Cauchon* for the responding party.

DECISION OF THE BOARD; April 7, 2006

1. This is a request for reconsideration of a decision of the Board (differently constituted) dated August 10, 2005 (the "Decision"), in which the Board dealt with an application for certification brought pursuant to section This is a request for reconsideration of a decision of the Board (differently constituted) dated August 10, 2005 (the "Decision 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Schedule A, as amended (the "Act").

2. In the Decision, the Board certified the applicant to represent its typical bargaining unit of carpenters and carpenters' apprentices in the ICI sector, Province-wide, and in Board Area 8 for all other sectors. In the Decision, the Board noted that the responding party, although duly served with the application material on August 2, 2005, according to the certificate of delivery filed by the applicant, failed to file a response within the time stipulated by Rule 135 and

failed to provide the information required by subsection 128.1(3) of the Act. The Board therefore determined that more than fifty-five percent of the individuals in the bargaining unit proposed in the application for certification were members of the union on the date the application was filed on the basis of the information provided by the applicant. At paragraph 9 of the Decision, the Board noted that the applicant filed membership evidence on behalf of 8 persons, all of whom the applicant claimed were employees in the bargaining unit.

3. The responding party subsequently filed a request for reconsideration of the Decision on the basis that the union did not, in fact, deliver a copy of the application for certification to the responding party and that the responding party was therefore deprived of any notice of the application. In its request for reconsideration, the responding party asserts that it was denied an opportunity to make relevant submissions, and that if it had had the opportunity to make those submissions, the Board would not have certified the applicant. The responding party therefore requests that the Board revoke the Decision and give it an opportunity to file a response at this time.

4. This decision addresses the responding party's request for reconsideration of the Decision.

5. The responding party has not yet filed the response it is asking the Board to consider should the Board grant its request for reconsideration. However, counsel for the responding party advised the Board orally at the hearing into the reconsideration request what the nature of the responding party's response to the application would be if the Board were prepared to entertain one. Counsel advised the Board in final argument that the responding party's response when filed (the "Response") would indicate that the responding party did not employ *any* individuals in the bargaining unit on the date of application for two reasons.

6. Firstly, the responding party contends that its employees working at the job site referred to in the application for certification located at the Royal Ontario Museum (the "ROM site") on the date of application were working as glaziers and mechanics engaged to produce and assemble display case frames. They were not performing carpentry work. According to the responding party, its employees had been granted work permits to come to Canada from Germany to perform work for the responding party, since there were no Canadian workers capable of performing the highly skilled work in question. Secondly, the responding party notes that it is possible that the employees whom the applicant claimed were employed in the bargaining unit on the date of application and for whom the union submitted membership evidence were, in fact, employees of one of the responding party's subcontractors, Site Shop Mobile Services. The responding party suggests that this is possible since the responding party does not know which workers the applicant claims were in the bargaining unit. In either event, the Response would indicate that the responding party did not employ any employees in the bargaining unit on the date of application.

7. Counsel also advised the Board on the last day of hearing in this matter held on February 8, 2006 that the responding party had completed its contract for work at the ROM site and that the responding party's employees had returned to Germany. Counsel also indicated that, although the responding party was in negotiations with the Royal Ontario Museum ("ROM") for future work, it had no contract for future work (i.e. presumably in Ontario) at that time.

8. The union disputes the responding party's contention that the application for certification was never properly delivered to the responding party. The union contends that it did, in fact, properly deliver the application for certification and the required supporting materials to the responding party in a manner that complied with the requirements set out in the Board's Rules of Procedure (the "Rules") and in the manner set out in the Certificate of Delivery filed with the Board, i.e. by facsimile transmission on August 2, 2005. The union contends that it delivered the application material to the responding party to the facsimile number provided to the applicant by Mr. Barry Cauchon, the responding party's Canadian representative at the ROM site.

9. The responding party does not take issue with the accuracy of the facsimile number but disputes ever receiving the facsimile in question. In this regard, the responding party asserts that Mr. Cauchon was in the trailer where the facsimile machine was located most of that day, "... and did not see a 58-page fax come through the fax machine".

The Issues

10. Although there is an issue with respect to the delivery of the application, regardless of the Board's finding in that regard, the Board must consider whether, in all of the applicable circumstances, it should exercise its discretion to revoke the Decision certifying the union in order to afford the responding party an opportunity to file the proposed Response.

The Evidence Concerning Service of the Application Material

11. The Board heard evidence concerning the factual dispute between the parties regarding whether the application material was ever properly delivered to the responding party on August 2, 2005 by the applicant.

12. Ms. Tiana Wilson, a legal assistant employed at the applicant's counsel's office, testified that she sent a copy of the application material to the responding party at facsimile number (416) 586-7947 on August 2, 2005. There is no dispute that that facsimile number is the correct number for the responding party's facsimile machine located in the project trailer at the ROM job site. Ms. Wilson introduced into evidence a facsimile transmission report generated on August 2, 2005 by the facsimile machine she used at counsel's office to send the application material to the responding party. That report records a successful transmission in respect of the 58 page fax sent to (416) 586-7947 commencing at 11:02 a.m. on August 2nd and ending at 11:12 a.m. on August 2nd. The transmission report states "OK" beside "status" of the transmission and also states *** SUCCESSFUL TX NOTICE ***.

13. Mr. Cauchon had a desk in the trailer where the facsimile machine is located, but did not have a clear view of the machine from his desk. He testified that he was in the trailer for the majority of the workday on August 2, 2005 and never saw the fifty-eight (58) page fax in question on that day or subsequently. He also states that he never saw a copy of the Confirmation of Filing of Application for Certification, Construction Industry (Form B-59) sent by the Board on August 2, 2005, despite the fact that the Board's records indicate that that form was successfully faxed to that same facsimile number at 3:37 p.m. on August 2, 2005. According to Mr. Cauchon, the first time he became aware that an application for certification had been filed was when he received a copy of the Board's Decision dated August 10, 2005 by mail shortly thereafter.

14. Mr. Cauchon could not explain why two different faxes sent on the same day to the responding party's facsimile machine never came to his attention. No transmission report(s) generated by the responding party's facsimile machine concerning the transmission history for August 2nd was entered into evidence. Mr. Cauchon explained that while journals may be printed by the facsimile machine from time to time about faxes sent or received, those journals are not kept. The Board does not therefore have any information before it to indicate whether the responding party's facsimile machine's transmission records would be consistent or inconsistent with the one generated by the facsimile machine used by Ms. Wilson (and/or that used by the Board when it sent the Confirmation of Filing to the responding party).

15. Mr. Cauchon could obviously not attest to having watched the facsimile machine all day. He absented himself from time to time to visit the job site or to use the washroom and was also according to him in a meeting with representatives of the union for a period of time that day. Mr. Cauchon acknowledged that it was possible that the two faxes did come through that day, but that someone in the site trailer may have thrown them out accidentally or that they were delivered to the wrong person. In this regard, Mr. Cauchon indicated that the facsimile machine in question is used by a variety of different people, and is used for a variety of different tasks (including for faxes and print jobs). Mr. Cauchon also indicated that he has in the past received faxes which were addressed to others.

16. According to Mr. Cauchon, he met with representatives of the union to discuss alternatives to certification on August 2, 2005. Mr. Cauchon did so because he was aware that representatives of the union had been on site the previous week. While the union suggested that that meeting in fact took place the following week on August 8, 2005, Mr. Cauchon indicated that he was on holidays that week. In either event, however, there is no dispute that the union's representatives did not tell Mr. Cauchon during the meeting either that an application for certification had been filed with the Board or that one had not been filed. During this meeting, they discussed alternatives to certification, including a proposal made by the responding party to avoid certification. Following this meeting, Mr. Cauchon's understanding was that the union's representatives would get back to him about the responding party's proposal.

Submissions of the Parties

17. The responding party did not take the position that Ms. Wilson was lying when she said she sent the application material to the responding party's facsimile machine on August 2nd, 2005. The responding party submits that it does not know what happened to the fifty-eight page fax sent that day, other than that it never came to the attention of Mr. Cauchon, the responding party's Canadian representative working at the ROM mobile construction site trailer.

18. Similarly, the union did not suggest that Mr. Cauchon's evidence that he never received the fax should not be believed. Instead, the union points out that whatever happened to the facsimile transmission sent on August 2nd, 2005 is not the responsibility of the union. In the union's submission, if the responding party did not receive the application material, the evidence suggests that the reason for this was because of inadequate administrative procedures in the site office. The union submits that those inadequate procedures are not the responsibility of the union and should not invalidate service by the union to the responding party.

19. While the responding party's counsel acknowledged in argument that the responding party is "perhaps at fault for not having the most sophisticated office in the world", that is not uncommon. The responding party submits that the evidence indicates that the responding party never did receive the application material and that in the circumstances the Board should grant the reconsideration request. The responding party points out that there is significant prejudice to the responding party if the Board were to refuse to do so in view of the evidence that the responding party never received the application material and of the fact there is no countervailing prejudice to the union if the Board were to entertain the Response at this time.

20. The responding party further relies on the decision of the Board in *New Generation Group*, [1998] OLRB Rep. November/December 990, for the proposition that the Board should exercise its discretion to entertain a late response notwithstanding any potential prejudice to the union where the response raises questions as to whether the employees whom the applicant claims to represent are, in fact, employees of the responding party.

21. The responding party distinguishes the Board's jurisprudence in *Iori Plaster & Drywall Contractors Ltd.*, [1997] O.L.R.D. No. 4411, File No. 1719-96-R and the cases that have followed it, in which the Board has generally refused to exercise its discretion to accept a late response. In those cases, the Board considered the fact that the union was prejudiced by not having the full two day period to consider properly whether to withdraw the application prior to the representation vote in order to avoid the possibility of a bar imposed under subsection 10(3) of the Act if it were to lose the vote. The responding party submits that the *Iori Plaster* line of cases are all distinguishable in that the present case involves an application for certification under the new card based certification scheme provided for under section 128.1 of the Act and not a certification application under section 8 of the Act. Unlike in those earlier cases, no representation vote took place in the present case. According to the responding party, in these circumstances, no prejudice to the union would result if the reconsideration request were granted whereas in the earlier cases there was extreme prejudice to the union associated with the possibility of a bar being imposed under subsection 10(3) of the Act.

22. The responding party also submits that the meeting held in early August 2005 between Mr. Cauchon and representatives of the union (the "August Meeting") is relevant to the exercise of the Board's discretion to reconsider. In this regard, the responding party notes that representatives of the union met with Mr. Cauchon after the application for certification had been filed and prior to the Decision issuing and never once mentioned to him that a certification application had already been filed. They discussed a proposal made by the responding party to avoid certification, which the responding party states had been made because its workers are from Germany and would be returning to Germany following the completion of the project. According to the responding party, the union left Mr. Cauchon with the impression that the responding party's proposal was favourably received and that the union would get back to Mr. Cauchon about it. The responding party suggests that this fact distinguishes the present case from the cases relied upon by the union, in which the Board has refused to consider a late response where the responding party was properly served with the application material, but for whatever reason that application material did not come to the responding party's attention in a timely way.

23. In summary, the responding party submits that the equities in the present case favour granting its reconsideration request given the August Meeting, the lack of any prejudice to the union under the card based regime under section 128.1, and the huge prejudice to the responding

party if the responding party were deprived of the opportunity to raise the important issues concerning the lack of any employees in the bargaining unit on the date of application. The responding party submits that, in the present case, there are no good labour relations reasons for denying its request to revoke the Decision.

24. The union responds that the evidence discloses that the application material was properly served on the responding party in accordance with the Rules. The union points out that Mr. Cauchon himself said that he had no reason to doubt that the application material was sent to the responding party's facsimile machine and he agreed that there were many explanations for why he did not receive the fax, none of which have anything to do with the union. For example, Mr. Cauchon thought it possible the responding party's facsimile machine received the fax but did not print it out properly because of a paper jam etc. He also agreed that it was possible the fax was delivered to the wrong person, misplaced or accidentally thrown out. According to the union, it is not the union's responsibility to ensure that all application packages sent are seen by representatives of the responding party.

25. The union relies on the decision in *Professional Masonry Service*, [2000] OLRB Rep. January/February 107 for the proposition that any lack of security or reliability in the manner the responding party receives material is a risk that should not be borne by the union. The union also refers to the following Board decisions, in which the Board has refused to accept a late response and/or revoke a certificate where the application was properly served, but for some reason did not come to the attention of representatives of the responding party in timely way: *Bristol Acoustic & Drywall Inc.*, 2004 CanLII 41635 (ON L.R.B.); *Ferano Construction Ltd.*, [1985] OLRB Rep. January 73; *Lifetime Homes*, 2004 CanLII 41619 (ON L.R.B.).

26. In addition, the union submits that its representatives had no obligation to inform Mr. Cauchon that an application for certification had been filed. The union further argues that Mr. Cauchon was, in any event, aware that the union wished to organize its employees since the underlying reason for the August Meeting was for the Company to present alternatives to certification and to discuss the impact of a certificate on the Company. Mr. Cauchon was aware at that time that employees had signed application for membership cards the previous week and he had seen one of the cards himself. Mr. Cauchon was also given a copy of the Carpenters' Provincial Collective Agreement at the meeting with the union. In all the circumstances, the union submits that it is not credible that Mr. Cauchon did not know the union planned to, or had, filed a certification application. Counsel also argues that Mr. Cauchon, in any event, agreed that no union representative misled him by saying that a certification application had not been filed.

27. The union further points out that under section 128.1 of the Act, the Board has no discretion to consider the names of employees in the bargaining unit (or lack thereof) contemplated under subsection 128.1(3) of the Act if they are filed with the Board after the two (2) day time limit contemplated under subsection 128.1(3) (*Air Kool Limited*, 2005 CanLII 29029 (ON L.R.B.) and *Zavarella Construction Ltd.*, 2005 CanLII 35171). As such, the Board could not entertain the responding party's late response for the purposes of revisiting its determination under section 128.1(4) regarding the percentage of employees in the bargaining unit who are members of the trade union.

28. The union further disputes that no prejudice would result to the union if the Board were to grant the request for reconsideration in order to consider a late response. In this respect,

the union notes that if after considering the responding party's submissions in response to this application the Board were to find it appropriate to direct that a representation vote be ordered, the union could face a bar under subsection 128.1(15) of the Act if fifty (50) per cent or fewer of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the union.

29. Finally, the union notes that any initial concern that the Board may have had about the fact that the responding party did not post notice of the application in the workplace prior to the certificate issuing was resolved by the Board's subsequent decision in this matter dated November 21, 2005 (the "November Decision"). By way of background, the Board notes that in the November Decision, the Board directed that notice of the application be provided to employees affected by the application at that time. The Board did so in view of the undisputed fact that the responding party had never posted the Notice to Employees of the application for certification and the fact that the project was still ongoing. In the circumstances, the Board followed the procedure outlined in *Zavarella Construction Ltd.*, cited above, and directed that notice to employees of the application for certification be given and allowed a period of time for employees to make any representations they wish in order to cure the lack of posting at the time that the application for certification was filed. The Board never received any representations from any individuals affected by the application for certification indicating a desire to make representations in this matter despite the opportunity to do so. In the circumstances, the responding party did not take issue with the union's contention in final argument that any initial lack of posting had been cured by the November Decision, nor did the responding party suggest that the Board should reconsider the Decision because of some inadequacy in the notice provided to employees.

30. For ease of reference, the relevant provisions of the Act and of the Rules are set out at Appendix "A" to this decision.

Decision

31. Pursuant to subsection 114(2) of the Act, the Board has a broad discretion to reconsider any decision or order made by it and to vary or revoke any such decision or order. However, the Board has repeatedly indicated that, in the interests of finality, it will not reconsider its decisions unless there are good reasons for doing so. The Board's approach to reconsideration requests was summarized as follows in *Baron Metal Industries Inc.*, [2001] OLRB Rep. July/August 931 at paragraph 15 and 16:

> 15. The limitations upon requests for reconsideration are well known. The Board reconsiders its decisions in limited circumstances. It balances the public interest in the finality of Board decisions against the need to correct decisions which are erroneously made, or which were made on the basis of inadequate or misleading information, or by default. The limited scope for reconsideration is described in *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320, at 324, para 11; *Ellis Don Limited*, [1989] OLRB Rep. Mar. 234, at 235, para 5; *John Entwistle Construction Limited*, [1979] OLRB Rep. No. 1096, at 1097, para 5; *The Doctor's Hospital*, [1983] OLRB Rep. Apr. 493, at 495, para 2; *Roy Construction and Supply Company Limited*, [1983] OLRB Rep. May 716, at 716, para 1.

> 16. The grounds on which reconsideration may be sought can be summarized as being: the request raises important issues of Board policy which have not been addressed adequately or at all; a party wishing to make a representation has not had an opportunity to do so previously; relevant evidence which could not previously have been obtained by reasonable diligence has become available and would likely affect the decision; or an obvious error has been made by the Board. The Board's approach is stringent – in the interests of finality, it will reconsider its decisions only when that is clearly required.

In the present case, the responding party suggests that the Board should reconsider the Decision because it is seeking to make representations and/or present evidence it had no previous opportunity to make or present. In this regard, the responding party contends that the application material was not properly delivered to it and that the representations it seeks to make would likely affect the decision.

32. Before assessing whether the Board should exercise its discretion to revoke the Decision in all the circumstances, the Board first turns to a consideration of whether in the present case the application for certification was properly delivered to the responding party in accordance with the Rules.

Did the applicant properly deliver the application for certification to the responding party?

33. The evidence before the Board indicates that Ms. Wilson did send the application material to the responding party's facsimile machine on August 2nd, 2005. This was within the required two-day period after the application for certification was filed with the Board on July 29, 2005. Further, the method of delivery used, being by facsimile transmission, is one of the three methods permitted under Rule 24.1 of the Rules. The successful transmission report entered into evidence also suggests that all 58 pages were successfully transmitted to the responding party's facsimile machine located in the ROM site trailer. The transmission report records a successful transmission to the responding party's facsimile machine and as such confirms receipt of the transmission by the responding party's facsimile machine.

34. In the absence of any record from the responding party's facsimile machine to suggest that no such transmission was received by it, the evidence before the Board establishes that that transmission was, in fact, received by the responding party's facsimile machine. The transmission report does not confirm whether any or all fifty-eight pages were successfully printed by the responding party's facsimile machine. The fact that the facsimile transmission in question never came to Mr. Cauchon's attention in circumstances where he could not attest to having watched the facsimile machine all day does not cast doubt on the accuracy of the transmission report entered into evidence. Similarly, the fact that Ms. Wilson has in the past received calls from clients asking her to re-send facsimiles successfully sent by her to them does not, in the Board's view, cast doubt on the accuracy of the transmission report entered into evidence, which, as noted, records simply a successful transmission to the receiving facsimile machine and not a successful printing of the transmission.

35. On the other hand, the Board has no reason to doubt Mr. Cauchon's evidence that *he* never in fact saw that facsimile transmission or the Confirmation of Filing sent by the Board that day and that as a consequence the responding party only became aware that an application for

certification had in fact been filed when he received the Board's Decision in this matter. It is certainly possible that either the facsimile transmissions received in memory in the responding party's facsimile machine did not print out properly due to a problem with the responding party's facsimile machine or that the printed faxes were misplaced or thrown out by anyone of a number of people who had access to the ROM site trailer and who also used that same machine.

36. The situation in the present case is therefore similar to that before the Board in *Professional Masonry Service*, [2000] OLRB Rep. January/February 107. In that case, the Board found that the application for certification had been properly delivered to the responding party within the time prescribed by the Rules even though it was never received by, or directly served on, an authorized agent or principal of the responding party. In that case, the application for certification was left in the responding party's mailbox by the applicant's organizers. However, because the union's organizers inadvertently lifted the flag on the side of the mailbox when delivering the application material to the mailbox, this signalled to the letter carrier from Canada Post that there was mail to be picked up. Later that day, the letter carrier noticed the upright flag and removed the application for certification without reading the address on the package.

37. In that case, the Board found that the trade union had "delivered" a copy of the application for certification in accordance with section 7(11) of the Act and the Board's Rules even though the application for certification was never received by or served on an authorized agent or the principal of the responding party. In doing so, the Board reasoned as follows at paragraph 22 and 23:

> 22. ... The Act is concerned with the economic vehicle which constitutes a business which employs employees rather than the legal form of that business. It is to that business, in whatever manner or through whatever form, it carries on its activities, that the Application must be delivered.
>
> 23. In any event, the Rule requires delivery to the responding party, i.e. the business. It does not require service on any person. The union delivered it to the only advertised address where that business is carried on. The organizers used the same physical apparatus that the business employed to receive mail from Canada Post, which included business documents such as cheques in payment for completed contracts. It is also the same physical apparatus that Canada Post would have employed had the applicant delivered the Application by Priority Courier, another option contemplated under the Rules. There is no evidence called with respect to the nature of Mr. Wilhelm's house [the location of the responding party's business] – whether there was a set of double doors between which the Application could have been left or some other secure place for delivery. The mailbox was the customary location which business documents, including cheques, were sent by customers of the responding party. If there was any lack of security in the mailbox, that is a risk which the responding party has accepted in the way it receives mail in the ordinary course of its business. This risk falls on the responding party: *Norben Interior Design Limited*, [1984] OLRB Rep. June 851 at paragraph 7 and *Forano Construction Ltd.*, [1985] OLRB Rep. Jan. 73.

Having regard to the Board's finding that the application was properly delivered to the responding party, the Board in *Professional Masonry Service*, cited above, refused to dismiss the union's certification application.

38. Similarly, in the present case, the union delivered the application for certification material to the responding party when it sent the facsimile transmission and that transmission was received by the responding party's facsimile machine. This is no different from delivery to the responding party's mailbox since both methods of delivery are permitted. If the responding party did not receive the transmission because of a problem with its fax machine (such as lack of paper, paper jam etc.) or because others had access to and used that machine or for some other reason unrelated to the union in this case, then that is a risk that falls on the responding party. In the present case, there is simply nothing more that the union could reasonably be expected to do to ensure delivery to the responding party by one of the methods permitted under the Rules other than, in this case, send the facsimile transmission to the correct facsimile number and wait for confirmation of a successful transmission.

39. In all the circumstances, the Board finds that the application material was properly delivered to the responding party on August 2nd, 2005 in accordance with the Board's Rules and as contemplated under subsection 128.1(2) and (3) of the Act. In the circumstances, the Board's determination at paragraph 6 of the Decision that the responding party, although duly served with the application material on August 2, 2005, failed to file a response within the time stipulated by Rule 135 [now 25.5] and failed to provide the information required by subsection 128.1(3) of the Act is correct. The Board, however, finds as a fact that the application material never did come to the personal attention of the responding party's representatives prior to the Board's Decision certifying the union.

Should the Board revoke the Decision and allow the Response in all the circumstances?

40. It therefore remains to be considered whether the Board should exercise its discretion to revoke the Decision in order to permit the responding party to file the Response. As noted, the proposed Response would indicate that there were no employees in the bargaining unit on the date of application.

(i) Significance of the August Meeting

41. While both parties refer to the August Meeting in support of their respective positions, the Board does not consider that meeting to have any bearing on the exercise of the Board's discretion in this case. In this regard, the Board firstly notes that there is no suggestion in this case that the union's representatives misled Mr. Cauchon by indicating that an application for certification had *not* been filed or that an application for certification *would not* be filed while the union considered Mr. Cauchon's proposal. Further, the union is under no obligation to inform representatives of a responding party that an application for certification was filed or to warn them to be on the look out for an application for certification delivered to the responding party.

42. On the other hand, it is also not relevant whether representatives of the responding party knew or ought to have known that a certification application had been or would be filed. Representatives of a responding party are not expected to speculate as to whether the union did or did not file a certification application based on their dealings with the union's representatives or

with their own employees for that matter. In the Board's view, it is irrelevant to the exercise of the Board's discretion whether Mr. Cauchon should reasonably have known that a certification application had been or would be filed. The fact that the union's representatives did not inform him that one had been filed or would be filed is similarly irrelevant since the union had no obligation to do so.

(ii) Whether the Response could materially affect the Result if it were entertained at this stage

43. As recently noted in *Carleton Iron Works Co. Limited [2006] OLRB Rep. Jan./Feb. 15* (unreported decision of the Board dated February 14, 2006 in Board File No. 2657-05-R), the Board will also not generally exercise its discretion to reconsider a decision unless the proposed evidence would have a material impact on the original decision. In that case, the Board was also considering whether to grant a request to reconsider a decision certifying the union under section 128.1 of the Act made in the absence of a response from the responding party. At paragraph 13 of that decision, the Board considered the appropriate exercise of its discretion, as follows:

> 13. Although the Board has discretion to reconsider any of its decisions, the Board generally will not do so unless there is a compelling reason or benefit that offsets the significant value of finality in labour relations matters (*K-Mart Canada Limited (Peterborough) [1981] OLRB Rep. Feb. 185*). Where there is new evidence offered that could not reasonably have been presented or adduced prior to such adjudication, the Board has generally not exercised its powers of reconsideration unless, among other things, the proposed new evidence would be "practically conclusive" or have a "material impact" in changing the original decision (see *Marli Mechanical Ltd., [1994] OLRB Rep. June 725* for a summary of the Board's approach to reconsideration). Something more than a missed opportunity must be shown.

The request for reconsideration in that case had been made by a number of employees of the responding party who had not received notice of the application at first instance and sought to challenge the Board's calculation of the trade union's membership support on the basis that there were in fact a number of additional employees in the bargaining unit than the trade union had estimated in the application. The Board however declined to reconsider the certification decision on the basis that the new evidence offered would not have a material impact in changing the original decision.

44. In the present case, the responding party seeks to file a response disputing the number of individuals the union claims were in the bargaining unit on the date of application. It contends that it did not employ any carpenters at the relevant time and therefore that there were no employees in the bargaining unit on the date of application. The responding party also suggests that it is possible that the union filed membership evidence on behalf of individuals who were employed by a third party. The responding party suggests that if it were permitted to file this Response, the Board would not reach the conclusion that more than fifty-five percent of the individuals in the bargaining unit proposed in the application for certification were members of the union on the date the application was filed.

45. While the responding party suggests that it is a significant concern that the certificate may have been obtained on behalf of strangers to the responding party, the responding party has not referred to any facts that would suggest that that is a real concern in this case. In the normal

course, a responding party must identify to the Board in its response to the application the names of its employees on the date of application and request that the Board satisfy itself that the membership evidence had not been filed on behalf of others (since, for obvious reasons, the application delivered to the responding party does not indicate the names of the individuals for whom membership evidence was filed) in order to verify that this is not an issue. In the present case, the responding party could also indicate the names, if known, of the employees of its subcontractor, since the responding party speculates that those individuals may have signed membership cards - not the responding party's employees.

46. However, in the present case, the responding party did not provide the Board with a list of the names of its employees employed on the date of application and, for the most part, only refers to its employees as the "German employees" and to the Site Shop Mobile Services employees as the "Canadian employees". The responding party's suggestion that the membership evidence filed by the applicant could relate to the Canadian employees of its subcontractor, Site Shop Mobile Services, appears to be based entirely on the assertion that employees of its subcontractor were also working at the ROM site on the date of application. In the Board's view, there is nothing in the facts referred to by the responding party in this connection that suggests that this is a serious concern warranting reconsideration.

47. More importantly, however, even if the Board were to accept the Response at this stage, neither of the two issues raised therein would alter the Board's determination in this case given the legislative constraints imposed under subsection 128.1 of the Act. In this respect, the Board notes that the statute requires that the Board's determination concerning the percentage of individuals in the bargaining unit who are members of the applicant be made "on the basis of the information provided in or with the application and under subsection (3)". In *Air Kool Limited,* 2005 CanLII 29029 (ON L.R.B.), the Board found that it has no statutory authority to extend the two day time limit under subsection 128.1(3), and that, as such, subject to subsection (5), it cannot consider information from the responding party provided later which, if considered, might affect the Board's calculation of the percentage under subsection 128.1(4) of the Act (See also *1621730 Ontario Inc. o/a Northern Construction and Maintenance,* [2005] OLRB Rep. September/October 725 and *Aves & Shaw Limited,* [2005] OLRB Rep. November/December 929). As such, while the Board has discretion to accept a late response, it does not, subject to subsection (5) have the discretion to consider information contained therein for the purposes of making its determination concerning the percentage of membership support under subsection 128.1(4) of the Act where that information was filed after the two day statutory time limit.

48. In the present case, if the responding party had provided the Response within the statutory time limit, the information in the Response to the effect that there were no employees in the bargaining unit on the date of application could have been considered for the purposes of calculating the percentage contemplated under subsection 128.1(4) of the Act. The Board could however only do so if it interpreted the reference in subsection 128.1(3) of the Act to "the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed" to be provided by the responding party as including information provided by the responding party to the effect there are no such names because there are zero employees. In the Board's view, that is the only reasonable interpretation of subsection 128.1(3) of the Act, since otherwise a responding party disputing that it had any employees in the bargaining unit could never have that information considered by the Board when it determined the percentage of membership support enjoyed by the trade union under subsection 128.1(4) of the Act.

49. However, given that the responding party in this case did not provide that information within the mandatory statutory two-day time limit, the Board's determination concerning the percentage of membership support under subsection 128.1(4) of the Act would remain the same even if the Response were permitted at this time. Subsection 128.1(4) of the Act requires that that calculation be made "on the basis of the information provided in or with the application and under subsection (3)." Since responding party did not provide any information within the two day time limit, that determination would nonetheless, by necessity, be made having regard to the information provided in or with the application only.

50. The situation in the present case is, in some respects, analogous to those cases involving certification applications filed under subsection 8 of the Act, in which the Board similarly has no discretion to entertain an objection under subsection 8.1 of the Act that was filed after the statutory two day time limit contemplated under subsection 8.1(3) of the Act. As noted in *Hospital Regional De Sudbury Regional Hospital*, [2002] O.L.R.D. No. 3612, decision dated October 24, 2002 Board File No. 2142-02-R, the time limits provided under that provision are mandatory. As such, while the Board may exercise its discretion to accept a late response for other purposes, it cannot consider information set out therein filed beyond a mandatory statutory time limit such as that contemplated under subsection 8.1(3) and also under subsection 128.1(3) of the Act.

51. In the Decision, the Board made its determination concerning the percentage of membership support contemplated under subsection 128.1(4) having regard only to the information provided in or with the application because the responding party did not provide the Board with any of the information contemplated under subsection 128.1(3) of the Act. Having determined that the percentage contemplated under subsection 128.1(4) exceeds fifty (55) percent, the Board then went on to certify the union having regard to the provisions of subsection 128.1(13) of the Act, which provides that the Board may, in these circumstances, either certify the trade union as bargaining agent of the employees in the bargaining unit or direct that a representation vote be taken.

52. The Board does have the discretion to accept any information provided in the Response for the purposes of making the determination required under subsection 128.1(13) concerning whether it should certify the trade union or whether it should direct that a representation vote be ordered. There is however nothing in the proposed Response that would cause the Board to exercise its discretion to direct that a representation vote be taken in circumstances where the Board has determined under subsection 128.1(4) of the Act that the percentage exceeds the required fifty-five percent. The two issues that the responding party seeks to raise in the Response both relate to the number of individuals in the bargaining unit on the date of application and therefore concern the percentage of the individuals in the bargaining unit who are members of the applicant. Even if the Board were to exercise its discretion to accept the proposed Response at this juncture, those issues would not cause the Board to direct that a representation vote be taken under subsection 128.1(13).

53. The Board is not therefore persuaded that the Response would materially affect the result in this case even if it were entertained at this stage. As such, the Board does not consider it appropriate to exercise its discretion to reconsider the Decision.

(iii) Significance of the Missing fax

54. However, even if the Board had found that the Response could materially affect the result, the Board does not in any event consider it appropriate to exercise its discretion to reconsider the Decision. In this regard, the Board observes that the responding party is responsible for any lack of security or diligence in the way in which it receives documents in the ordinary course of business. (See *Professional Masonry Service*, cited above). As noted in *Bristol Acoustic & Drywall Inc.*, cited above, the responding party bears responsibility for ensuring that the business functions properly. In that case, the application for certification had been delivered to the registered head office of the responding party, but did not come to the attention of representatives of the responding party in a timely way because that location was not staffed. Because of this, the owner of the responding party did not receive the application for certification until the day before the vote was held. The Board in that case indicated that this was not a reason for failing to file a response. The Board reasoned follows at paragraph 11:

> 11. The fact that the owner of Bristol did not have possession of the paper until June 6, 2004 is not a reason for failing to file a response. If an employer carries on business from a particular address and indicates to the public through its advertising, letterhead or its corporate registered address that it carries on business at a particular office and that it is prepared to do business by receipt of documents at a given fax number, it bears the responsibility for ensuring that the business functions properly. Another party is not responsible for the fact that the employer chooses not to have any person attend at the place of business for a period of time. Delivery to that address is delivery to the responding party: *Norben Interior Design Ltd.* [1984] OLRB Rep June 851; *Professional Masonry Service* [2000] OLRB Rep. Jan/Feb 106.

In that case, the Board refused to exercise its discretion to accept a late response that took issue with the applicant's estimate of the number of individuals in the proposed bargaining unit. The Board refused to do so because of the prejudice to the union referred to in *Iori Plaster & Drywall Contractors Ltd.*, cited above, and notwithstanding the fact that the responding party did not receive the application for certification in a timely way.

55. However, as counsel for the responding party correctly points out, the *Iori Plaster* line of cases are distinguishable in that none involved certification applications filed under the new card based system under section 128.1 of the Act. The same is of course also true of the Board's decision in *New Generation Group*, cited above, on which the responding party relies. As noted above, in that case, the Board accepted that it should entertain allegations in a response that the individuals whom the applicant claims to be its members are not in fact employees of the responding party regardless of any potential prejudice to the union caused by the responding party's delay. While the Board may be guided by the principles enunciated in these earlier decisions involving certification applications filed under section 8 of the Act, the Board must be mindful of the extent to which they are applicable in the context of the present application filed under section 128.1 of the Act.

56. The Board must also bear in mind that, unlike those decisions, the present case does not involve simply whether to relieve against the time limits for filing a response in the context of an ongoing proceeding. Where that is the only issue, the Board's usual concern is with potential prejudice to the other party. In the present case, the issue is whether the Board should exercise its

discretion *to reconsider* a decision and re-open a matter that has been finally disposed of by the Board. In these circumstances, the Board must also consider the appropriate exercise of its discretion having regard to the important principle of finality in Board decision-making. As noted above, the Board has generally only been prepared to reconsider a decision where a party seeks to make new representations if that party had no previous opportunity to make them.

57. Even prior to the vote based certification regime and the prospect of a statutory bar introduced by the legislature in 1995, the Board has been reluctant to reconsider a certificate issued in the absence of a response where, as here, the application material, was properly delivered, but did not come to the responding party's attention in a timely way. In *Ferano Construction L.T.D.*, cited above, the Board refused to reconsider a certificate issued under the card based certification regime in effect in 1985, notwithstanding the absence of any finding of prejudice to the union. In that case, the responding party was unaware of the application because it had refused to accept delivery of it since its controller was absent that day. The Board refused to revoke the certificate on the basis of the principle enunciated in *Norben Interior Design Ltd.*, [1984] OLRB Rep. June 851 that a party who fails to advise itself of correspondence delivered to it does so at its peril. In that latter decision, the Board also refused to revoke a certificate where the application for certification had not come to the attention of the responding party's representatives in a timely way because mail at the post office box where the application was delivered is picked up only every one or two weeks.

58. Although the Board in *Professional Masonry Service,* cited above, did find it appropriate to exercise its discretion to extend the time for filing a response where the application was properly delivered to the responding party but never did come to the attention of its representatives (because it was subsequently removed from the mail box), it is significant to note that, in that case, the Board had not yet disposed of the application at the time the request was made. As such, there was no need to reconsider or revoke a decision and no consideration of the interests of finality in Board decision-making. The only real issue was potential prejudice to the other party. In the present case, however, given that the responding party is seeking a revocation of the Decision, the issue is also whether the responding party is seeking to make representations it had no prior opportunity to make.

59. In the Board's view, a party who fails to keep adequate track of facsimiles received by its facsimile machine similarly does so at its peril. Where a party fails to do so, it is similarly not possible to say that the representations it later seeks to make are ones that it had no prior opportunity to make. In the present case, the applicant was entitled to rely on the facsimile number it used when it delivered the application material to the responding party. In the circumstances, the Board is not persuaded that the responding party satisfied the relevant criteria for reconsideration.

Disposition

60. For all the reasons set out above, the Board does not consider it appropriate to reconsider the Decision. The request for reconsideration is hereby dismissed.

APPENDIX "A"

The relevant provisions of the Act read as follows:

114. (1) The Board has exclusive authority to exercise the powers conferred upon it by or under this Act and to determine all questions of act or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

128.1 (1) A trade union applying for certification as bargaining agent of the employees of an employer may elect to have its application dealt with under this section rather than under section 8.

(2) The trade union shall give written notice of the election,

(a) to the Board, on the date the trade union files the application; and

(b) to the employer, on the date the trade union delivers a copy of the application to the employer.

(3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice under subsection (2), the employer shall provide the Board with,

(a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and

(b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7 (14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.

(4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),

(a) the bargaining unit; and

(b) the percentage of employees in the bargaining unit who are members of the trade union.

(5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the

Board considers it appropriate to consider the evidence and submissions in making a decision under this section.

(6) The Board may hold a hearing if it considers it necessary in order to make a decision under this section.

. . .

(12) If the Board is satisfied that at least 40 per cent but not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it shall direct that a representation vote be taken.

(13) If the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it may,

(a) certify the trade union as the bargaining agent of the employees in the bargaining unit; or

(b) direct that a representation vote be taken.

(14) If the Board directs that a representation vote be taken,

(a) the vote shall, unless the Board directs otherwise, be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the direction for a representation vote is made;

(b) the vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made;

(c) the Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs;

(d) subject to section 11.1, the Board shall certify the trade union as bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union; and

(e) subject to section 11, the Board shall not certify the trade union as bargaining agent of the employees in the bargaining unit and shall dismiss the application for certification if 50 per cent or fewer of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(15) If the Board dismisses an application for certification under clause (14)(e), the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee who

was in the bargaining unit proposed in the original application until one year after the original application is dismissed.

(16) Despite subsection (15), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,

(a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and

(b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

...

(19) Sections 8, 8.1 and 10 do not apply in respect of a certification application that the trade union has elected to have dealt with under this section.

(20) Section 128 applies with necessary modifications to determinations made under this section.

(21) Subsection 7(9) applies, with necessary modifications, if the trade union withdraws the application for certification,

(a) before the Board takes any action under subsection (7), (12) or (13); or

(b) after the Board directs a representation vote under subsection (12) or clause (13)(b), but before the vote is taken.

(22) Subsections 7(9.1), (9.2) and (9.3) apply, with necessary modifications, if the trade union withdraws an application for certification in the circumstances described in subsection (21) and had withdrawn a previous application for certification not more than six months earlier.

(23) Subsections 7(10), (10.1) and (10.2) apply, with necessary modifications, if the trade union withdraws the application for certification after a representation vote is taken in accordance with the Board's direction under subsection (12) or clause (13)(b).

....

(c) if the Board directs that a representation vote be taken and more than 50 per cent of the ballots cast in the representation vote are cast in favour of the trade unions on whose behalf the application was brought, the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas; and

(d) if the Board dismisses the application for certification under clause (14)(e), the Board shall not consider another application for certification by the employee bargaining agency or the affiliated bargaining agent or agents to certify the trade unions as bargaining agent for the employees in the bargaining unit until one year after the dismissal.

(25) For the purposes of subsection (24), the terms "affiliated bargaining agent" and "employee bargaining agency" have the same meanings as in subsection 151(1).

(26) This section applies in respect of applications made on or after the day section 8 of the *Labour Relations Statute Law Amendment Act, 2005* comes into force.

The relevant Rules are as follows:

6.7 The date a document is delivered is the date that document is received by another party or its authorized representative. However, a document delivered after 5:00 p.m. will be deemed to be delivered on the next day and a document delivered by regular mail will be deemed to be delivered on the fifth day after the document was mailed.

24.1 Applications and all other material required to be delivered under Part V of these Rules must be delivered in one of the following ways:

(a) facsimile transmission;
(b) Priority Courier;
(c) Hand delivery; or
(d) Any other way agreed upon by the parties. ...

25.3 The applicant must deliver the following to the responding party not later than two (2) days after filing the application with the Board:

(a) a completed copy of the application (but not including the material described in paragraphs (a), (b), and (c) of Rule 25.1);

(b) a blank copy of the form set by the Board for responding to the application (Form A-72), including Schedule A (List of Employees);

(c) a completed copy of the Notice to Employer of Application for Certification, Construction Industry (Form C-32);

(d) a copy of Information Bulletin No. 6 – Certification of Trade Unions in the Construction Industry;

(e) a copy of Information Bulletin No. 8 – Vote Arrangements in the Construction Industry;

(f) a copy of Information Bulletin No. 9 – Status Disputes in Certification Applications in the Construction Industry;

(g) a copy of Part V of the Board's Rules of Procedure.

1634-04-R IBEW Construction Council of Ontario, Applicant v. **Johnson Controls Ltd.,** Johnson Controls Nova Scotia U.L.C., Johnson Controls L.P., Johnson Controls World Services Ltd., Brookfield Management Services Ltd. and Brookfield LePage Johnson Controls Facilities Management Services Ltd., Responding Parties

Construction Industry – Parties – Related Employer – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

BEFORE: *Norm Jesin*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell* and *John Pender* appearing for the applicant; *Allen Craig*, and *Graham Walsh* appearing for Johnson Controls Nova Scotia U.L.C.; *Steve Richards* appearing for Johnson Controls L.P.; *David Elenbaas* appearing for Brookfield Management Services Ltd.; *David Daniels*, *Mark Goldenberg* and *Clifford Hunt* appearing for Brookfield LePage Johnson Controls Facilities Management Services Ltd.

DECISION OF THE BOARD; March 6, 2006

1. This is an application filed pursuant to ss. 1(4) and/or 69 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (hereinafter the "Act").

2. At the outset of the proceedings, the responding parties brought a preliminary motion to dismiss the application. The responding parties assert that this application was filed in contravention of a settlement reached in Board File Nos. 2550-98-R and 2559-98-G and should therefore not be allowed to proceed.

3. The parties filed an agreed statement of facts as well as a book of documents relevant to the motion. This was supplemented by evidence from Mr. Pender, secretary treasurer of the applicant.

4. The applicant IBEW Construction Council of Ontario (hereinafter the "Council") together with International Brotherhood of Electrical Workers comprise a designated employee bargaining agency representing in bargaining those electricians employed in the industrial commercial and institutional sector of the construction industry, that are represented by the applicant's affiliated locals. The International Brotherhood of Electrical Workers Local 586 (hereinafter "Local 586") is one of those Locals. The Council is itself an affiliated bargaining agent of the bargaining agency.

5. Board File No. 2550-98-R is an application under ss. 1(4) and/or 69 filed against three of the same responding parties that are the subject of the present proceedings before me. Local 586 is the only applicant listed on the title of proceedings in that file. However, the application form contains the name and contact information of both Local 586 and the Council in that part of the form requiring the insertion of the name and contact information for the applicant, notwithstanding that the Council's name never appears in the title of proceedings in that file.

6. Board File No. 2559-98-G is a grievance referral filed by Local 586 pursuant to s. 133 of the Act against the same responding parties as those in Board File No. 2550-98-R. (Board File Nos. 2550-98-R and 2559-98-G are hereinafter referred to as the "1999 proceedings".)

7. All parties in the 1999 proceedings were represented by senior and experienced labour relations counsel (though not the same senior and experienced counsel that presented the present case before me).

8. The 1999 proceedings were resolved by Minutes of Settlement dated July 7, 1999. The settlement is reproduced in its entirety, below:

Draft: July 7, 1999

O.L.R.B. File No. 2550-98-R
O.L.R.B. File No. 2559-98-R

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 586

("Applicant")

- and -

JOHNSON CONTROLS LTD.,
BROOKFIELD MANAGEMENT SERVICES LTD.,
BROOKFIELD MANAGEMENT LIMITED,
BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITY
MANAGEMENT SERVICES LTD.

("Responding Parties")

MINUTES OF SETTLEMENT

The parties to the above proceedings before the Ontario Labour Relations Board (OLRB File Nos. 2550-98-R and 2559-98-G) ("the Proceedings") each agree with the other to resolve the Proceedings and the grievance dated July 20, 1998 upon the following terms and conditions:

1. Johnson Controls Ltd. acknowledges that it is bound and continues to be bound to the Principal Agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario (the "Electricians" Provincial Collective Agreement").

2. The parties acknowledge that Brookfield Management Limited, Brookfield Management Services Limited and Brookfield LePage Johnson Controls Facility Management Services are not bound by the Electricians' Provincial Collective Agreement referred to in paragraph 1 above and that these Minutes of Settlement are not intended to be and do not constitute a collective agreement or a part of a collective agreement.

3. Brookfield LePage Johnson Controls Facility Management Services agrees that any and all ICI construction work (as defined under the Labour Relations Act) covered by the Electricians' Provincial Collective Agreement occurring within the Counties of Lanark, Regional Municipality of Ottawa-Carleton, Renfrew, Prescott and Russell in the Province of Ontario (the "Jurisdiction") under the control or direction of Brookfield LePage Johnson Controls Facility Management Services or for the performance of which Brookfield LePage Johnson Controls Facility Management Services could either hire its own employees or contract or subcontract to another entity, shall be contracted or subcontracted to contractors bound to the Electricians' Provincial Collective Agreement, except where the total project hours are expected to be less than two hundred (200) hours during any 4 week period.

4. Brookfield LePage Johnson Controls Facility Management Services declares that it is not its present intention to employ in the Jurisdiction more than the current ratio of 10 electricians per 1,000,000 square meters (or a ratio of 1 electrician per 100,000 square meters) of space under its management directly for the purpose of avoiding contracting or subcontracting work pursuant to these Minutes of Settlement. If Brookfield LePage Johnson Controls Facility Management Services directly employs in the Jurisdiction more than 10 electricians per 1,000,000 square meters of space under its management for any period in excess of 8 weeks, Brookfield LePage Johnson Controls Facility Management Services shall pay those electricians in excess of such ratio at the rates of wages and fringe benefits outlined in the attached Schedule "A".

5. Effective May 1, 2001, May 1, 2004 and May 1, 2007, the Applicant and Brookfield LePage Johnson Controls Facility Management Services agree that the wages and fringe benefits outlined in the attached Schedule "A" shall be adjusted by the same percentage increase or decrease as the percentage increase or decrease which has occurred in the wages and fringe benefits for members of the Applicant employed in ICI sector in the Jurisdiction since the previous Electricians' Provincial Collective Agreement was negotiated.

6. The Applicant will provide a list to Brookfield LePage Johnson Controls Facility Management Services of all contractors in the Jurisdiction who are bound by the Electricians' Provincial Collective Agreement of the rates as set out in this Agreement.

6(b) Brookfield LePage Johnson Controls Facility Management Services will provide to the Applicant a monthly listing and copies of all electrical subcontracting contracts, for all building facilities and job sites in board areas 13, 14 and 15 under the direction or control of Brookfield LePage Johnson Controls Facility Management Services, where total project hours for the electrical portion of the work is 200 hours or more during any 4 week period.

7. These Minutes of Settlement will be effective for a period of ten (10) years commencing January 1, 1999. Thereafter, but not before, the Applicant and/or any affiliated bargaining agent of the International Brotherhood of Electrical Workers and the IBEW Construction Council on [sic] Ontario will be free to file related employer/sale of a business applications involving one or more of the same parties hereto at the Ontario Labour Relations Board, including filing a new related employer/sale of a business application identical or similar to the one in these Proceedings. Notwithstanding any provisions of these Minutes of Settlement the applicant will be entitled to rely on any and all facts and pleadings in the instant Applications. Both parties agree that they shall carry out the terms of this agreement in good faith and that each owes to the other a duty of good faith in the interpretation and administration of these minutes of settlement.

8. These Minutes of Settlement constitute full and final settlement of the Proceedings and the grievance dated July 20, 1998 filed by the Applicant.

8(b) These Minutes of Settlement shall be binding upon and shall continue to the benefit of the respective successors, assigns of Brookfield LePage Johnson Controls Facility Management Services and to any common or successor employer of Brookfield LePage Johnson Controls Facility Management Services.

9. These Minutes of Settlement constitute the settlement of a proceeding under the Act and are therefore enforceable pursuant to Section 96 of the Act.

10. The Proceedings and the grievance dated July 20, 1998 are withdrawn.

DATED THIS 7th DAY OF JULY, 1999

("Ken Scott")
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 586

("Illegible Signature")
JOHNSON CONTROLS LTD.

("Illegible Signature")
BROOKFIELD MANAGEMENT LIMITED

("Illegible Signature")
BROOKFIELD MANAGEMENT
SERVICES LIMITED

("Illegible Signature")
BROOKFIELD LEPAGE JOHNSON
CONTROLS FACILITY MANAGEMENT
SERVICES LIMITED

9. The Minutes of Settlement do not list the Council as a party. Furthermore, there is no signature that purports to bind the Council to the Settlement. The only union signature is that of Ken Scott purporting to sign on behalf of Local 586. Yet paragraph 7 of the Minutes of Settlement clearly indicates that neither "the Applicant" in those proceedings nor "any affiliated bargaining agent of the International Brotherhood of Electrical Workers and [the Council]" will commence an application such as the one presently under consideration until at least January 1, 2009. That clause was in the original proposal for settlement drafted by Counsel for one of the responding parties.

10. In his evidence, John Pender indicated that Ken Scott, the signatory for Local 586 in the Minutes of Settlement was the Business Manager of that Local at the time the Settlement was reached. He also testified that Mr. Scott was the President of the Council at that time. At present Mr. Scott holds neither position.

11. No evidence was presented, either in the agreed facts or by *viva voce* testimony, to indicate whether the responding parties were aware that Mr. Scott was President of the Council at the time they entered into the 1999 Settlement.

12. In his evidence, Mr. Pender indicated that the Council had not become aware of the details of the 1999 settlement until 2003. He indicated that Mr. Scott did not have the authority to bind the Council to the 1999 settlement on his own. According to Mr. Pender, the Council became aware of the settlement when Mr. Scott's successor, James Barry complained to him about it.

13. It should also be noted that on two occasions, one in 2001 and one in 2003, Local 586 pursued claims to enforce the 1999 settlement. One of those efforts resulted in the filing of an application before the Board pursuant to s. 96(7) of the Act. In those proceedings the Board issued a decision giving effect to the settlement.

14. The responding parties assert that in the circumstances described above the Council is bound by the settlement and is prohibited from filing this application until January 1, 2009 as stipulated in paragraph 7 of the Minutes. They assert that the Council was an applicant in the 1999 proceedings and that the 1999 settlement was therefore binding on it. Alternatively, they assert that Mr. Scott had the authority, either actual or ostensible to bind the Council to the settlement.

15. The Council submits that it is not a party to the settlement and therefore cannot be bound by it. It further submits that in any event, Mr. Scott did not have the ostensible authority to bind the Council to the settlement in the circumstances of this case. Finally, the Council submits that the settlement constitutes an agreement other than a provincial agreement and as such is contrary to s. 162 of the Act.

16. I would begin by pointing out that although it is generally preferable to ensure that written agreements are set out in clear wording that is easily interpreted, that is not always possible. Negotiations are sometimes described as the art of the possible, and at times it may be possible to achieve an ambiguous settlement where a clear one cannot be reached.

17. In this case there is ambiguity in the 1999 settlement. On the one hand, the body of the settlement clearly indicates that the Council in this case would be prohibited from filing an application such as this one prior to 2009. The problem however is that the settlement does not indicate anywhere that the Council is party to that settlement.

18. S. 96(7) of the Act provides as follows:

> **96.** (7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

19. Under this section a settlement of a proceeding is enforceable if it is in writing and signed by the parties or their representative. The 1999 settlement meets those criteria and is clearly an enforceable settlement under that provision. However, the settlement is only binding on those parties "who have agreed to the settlement". It can only be enforced against those parties who have indicated their agreement to it.

20. I do not doubt that Mr. Scott, as President of the applicant, had at least the ostensible authority to bind the Council. However, as is common in the construction industry Mr. Scott held positions with his local as well as with the Council. To use the vernacular common in the industry he "wore more than one hat". It is important to determine in which capacity he was acting when he entered into the 1999 settlement.

21. On the face of the settlement, Mr. Scott only signed the document in his capacity as President of Local 586, and not on behalf of the Council. The fact that the Council is not listed as a party in the title of the settlement is reflective of the fact that the Council was not made a party to the settlement. In addition, the evidence did not establish that the responding parties were told or even knew that Mr. Scott had any official position with the Council when they entered into the settlement. In the circumstances of this case paragraph 7 by itself is insufficient to establish that the Council agreed to the settlement. That being the case there is no written settlement between any of the responding parties and the Council, or that the Council has agreed to. It does not matter whether the applicant was a party to the 1999 proceedings. A settlement only binds those that have agreed to it. If only some of the parties in a proceeding resolve a dispute, that resolution cannot bind those parties that were not party to the settlement.

22. The responding parties suggest that it was incumbent on Mr. Scott to inform the responding parties that he was not representing the Council if his intention was not to bind them. I disagree. A party to a settlement, in this case Local 586, cannot purport to bind an entity that has not agreed to that settlement. Certainly the settlement document itself is an indication that Mr. Scott was not representing the Council as his signature appears only for Local 586 and not the Council.

23. One can only speculate as to why the 1999 settlement was drafted to include the undertaking in paragraph 7, but not to indicate that the undertaking was being agreed to by the applicant. It may be that the parties were being deliberately ambiguous, or there may be some other reason that the applicant was not made a party. Such speculation is irrelevant to the determination of this case. Simply put, this settlement cannot be enforced under s. 96(7) of the Act to prevent these applications from proceeding.

24. In light of my conclusions to this point it is not necessary for me to deal with the applicant's submission that the 1999 settlement should not be enforced as it was null and void pursuant to s. 162 of the Act.

25. For these reasons, the preliminary motion of the responding parties is dismissed and this matter will proceed on its merits. If as a result of this decision, however, Local 586 seeks in any way to enforce the Council's provincial collective agreement prior to January 1, 2009, the Board would obviously entertain any submission that such attempt is inconsistent with the 1999 settlement.

26. This matter is referred to the Registrar.

27. I am not seized.

2110-05-ES Muhammad Jamil Khattak, Applicant v. **Keromena Holdings Ltd.** and Director of Employment Standards, Responding Parties

Damages – Employment Standards – Reprisals – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Jamil Khattak* appearing on his own behalf; *Norma Mikhail*, *Hany Fayez* and *Magdy Mikhail* appearing for the responding party employer; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD; April 19, 2006

1. The style of cause is hereby amended to reflect the correct name of the responding party employer: "Keromena Holdings Ltd.".

2. This is an employee application under the *Employment Standards Act, 2000* S.O. 2000, c.41, as amended (the "Act") for review of the refusal of an Employment Standards Officer ("the Officer") to issue an order to pay.

3. Following the investigation of the applicant's claim, the Officer arranged for the responding party employer ("Keromena" or "the company") to pay $827.67 to the applicant (or "Mr. Khattak") in respect of public holiday and public holiday premium pay, unauthorized deductions from wages, and termination pay of one week's wages, plus vacation pay of four per cent calculated on the amount of the termination pay.

4. Mr. Khattak contends he is entitled to more than the amount the Officer arranged Keromena to pay him. The applicant additionally claims six days wages when he was initially being trained by the company. He also claims vacation pay on all wages earned throughout his employment. He says that he did not receive meal breaks every five hours, and wishes to be compensated for the resulting physical hardship he endured. He claims that he was terminated because he insisted upon his rights under the Act, and he seeks compensation as a result of the alleged reprisal.

The Evidence

5. The main evidence consisted of the testimony of Mr. Khattak and Norma Mikhail, the applicant's manager and the President of Keromena. The discrepancies in their testimony are described below. Ms. Mikhail's spouse, Magdy Mikhail, who assisted her in her duties, and Harry Fayez, an accountant who provided occasional accounting services to Keromena, also testified. Their evidence was very brief, and of limited assistance in the determination of this matter.

6. Keromena is a private corporation whose main business is to operate a gas station on Jane Street in Toronto. The company hired Mr. Khattak as a cashier in the spring of 2004. He was employed until January 27, 2005, at which time Ms. Mikhail dismissed him following a verbal confrontation between them. Mr. Khattak filed his claim under the Act with the Ministry of Labour on April 27, 2005.

7. The workplace parties entered into a very brief written employment agreement on April 29, 2004 which established simply that Mr. Khattak would start working as a cashier for the company as of May 5, 2004 at the hourly rate of $7.15 plus 4 per cent vacation pay. The vacation pay was folded into the applicant's bi-weekly pay, and did not appear as a discrete item of his compensation.

8. There was no dispute between the workplace parties that Mr. Khattak engaged in training as a cashier in the course of several shifts prior to May 5, 2004. He claims he worked six shifts, each of eight hours, whereas the company says he completed four shifts of six hours each. They agree Mr. Khattak was not paid. As I have pointed out, the applicant seeks in this matter to be compensated for those unpaid shifts. It is not necessary for me to resolve the factual dispute between the workplace parties as to how much training Mr. Khattak completed. He is too late under the Act to make a claim for those wages, which otherwise were payable. He was entitled to those wages some time in mid-to-late May 2004. He filed his claim more than six months after the wages became due to him. In those circumstances, section 111(1) of the Act operates to prevent any relief in respect of the unpaid wages. Subsection 111(1) states:

> **111. (1)** If an employee files a complaint alleging a contravention of this Act or the regulations, the employment standards officer investigating the complaint may not issue an order for wages that became due to the employee under the provision that was the subject of the complaint or any other provision of this Act or the regulations if the wages became due more than six months before the complaint was filed.

9. Following the training, commencing May 5, 2004, Mr. Khattak worked full time hours, between 40 and 44 a week, in a variety of shifts for most of the remainder of his employment. He was not paid holiday pay or holiday premium pay on account of Victoria Day or Canada Day. He testified he learned from another employee, Sarfray Ali, that he had managed to get paid holiday pay for those two holidays. Mr. Khattak testified that, given Mr. Ali's revelation, he was hopeful that the company was now committed to paying holiday pay as required by law.

10. Labour Day and Thanksgiving came and went with no change in the applicant's compensation. Mr. Khattak claims he approached Ms. Mikhail and politely asked if the company would pay holiday pay, only to be told that it was not Keromena's practice. The applicant did not press the issue. But as the Christmas season approached, he became more insistent. This time Ms. Mikhail relented somewhat, and agreed to pay the applicant four hours' additional pay for each shift worked on Christmas Day and New Year's Day. Mr. Khattak worked on both Christmas Day and New Year's Day, and received the four hours additional pay on each. He did not work on Boxing Day, and received no wages that day.

11. Ms. Mikhail's evidence differed somewhat from the applicant's version. She insisted that Mr. Khattak did not say anything about public holidays until December 2004, when he raised

the issue in anticipation of Christmas. (This was partially corroborated by Mr. Mikhail, who testified that he never heard Mr. Khattak raise concerns about statutory holiday pay, although he did overhear him complaining to Ms. Mikhail about other things, such as his shift assignments. Mr. Mikhail conceded, however, that he was not privy to all the conversations between his spouse and the applicant.) Ms. Mikhail stated further that she had no idea the company might not be in compliance with the public holiday provisions of the Act, and, after hearing Mr. Khattak's complaint, instructed her accountant to look into it. She did not dispute that the company then decided to pay the additional four hours for Mr. Khattak's shifts worked on Christmas Day and New Year's Day. She testified that she did not check to see whether other employees had not been paid in accordance with the Act because no one but Mr. Khattak complained about statutory rights.

12. Mr. Khattak testified that on January 2, 2005, Ms. Mikhail informed him that he could expect an immediate reduction in his weekly shifts, from five to three, and that, in fact, his hours were reduced accordingly. Ms. Mikhail attempted in her testimony to downplay the applicant's assertion. She referred to time sheets tendered in the course of the hearing covering the period from November 1, 2004 until the applicant's termination on January 27, 2005. The time sheets are pre-printed forms which list all the employees on a column to the left, followed by columns for each day of the week, Monday through Sunday. The daily columns are subdivided into "In" and "Out" columns, which the employees were expected to fill in, indicating the start and finish times of their shifts.

13. The time sheets do not support Ms. Mikhail's denials. In fact, they clearly show that Mr. Khattak, with rare exception, consistently worked an average of five shifts per week, until the week of January 3, 2005. Thereafter, the documents also clearly establish that he was assigned no more than three shifts per week. In any case, Ms. Mikhail acknowledged that, if indeed she reduced Mr. Khattak's weekly shifts, it was because of his poor attitude.

14. On January 27, 2005, Ms. Mikhail summoned Mr. Khattak to her office, and inquired whether he intended to attend a recently promoted staff meeting on the following Sunday, his day off. He said he had to look for a job with more than three shifts, and that Sundays were reserved for his family. The conversation became tense, which was not all that unusual given that Mr. Khattak was not above complaining and arguing with Ms. Mikhail over the course of his employment. She generally found his attitude and vocal outbursts disrespectful, and had on more than one occasion asked him to desist. There was no dispute that Mr. Khattak made critical comments about Ms. Mikhail's attributes as a manager during their conversation on January 27, 2005, although the comments were not particularly impolite, nor accompanied by profanity. In any event, Ms. Mikhail told the applicant to return to his cashier duties. A few minutes later, she came out of her office and told Mr. Khattak to go home, that he could no longer work for the company.

15. Ms. Mikhail testified that she would have terminated Mr. Khattak three weeks earlier (presumably at the beginning of January, when his shifts were reduced) but for the fact that his daughter was extremely ill. However, she relented until January 27, 2005, at which point she reached the end of her tolerance of Mr. Khattak's rudeness.

16. Mr. Khattak testified that, following his termination, he applied for and received Employment Insurance benefits from February 10, 2005 until January 27, 2006. A month later,

on February 27, 2006 he finally found gainful employment. Initially, following his termination, he looked for work similar to the non-skilled work he had undertaken with Keromena, so that he might sustain himself and his family in the short term.. He tried some Petro-Canada gas stations and a Home Depot store, but he found that his dismissal from Keromena was a liability. Prospective employers were not willing to hire him upon learning of the circumstances of his termination at Keromena. He applications were rejected on four occasions.

17. Mr. Khattak therefore decided to obtain Canadian certification as an information systems auditor, given he already had a Master's degree in information technology. He wrote and passed the examination in June 2005. He looked for information technology jobs via the Internet. He finally obtained a well-paying position as an information technology auditor for an organization by the name of MGA. He earns many times the hourly rate he made at Keromena.

18. In the course of his cross-examination, Keromena's representative briefly questioned Mr. Khattak about the amount of time required to prepare for his examination. Mr. Khattak said that, because he already had his Master's degree, he did not spend a lot of time preparing. He estimated he spent about one week of study.

Decision

19. I have no doubt that Ms. Mikhail dismissed Mr. Khattak because she found him argumentative and a complainer. He challenged her authority. Part of that challenge involved an assertion of his rights to holiday pay under the Act, and his insistence that those rights be respected. He was the only employee who challenged Ms. Mikhail in that way. It is not necessary for me to determine if he continuously raised the issue of holiday pay over a substantial period of time. There is no dispute that he challenged the company's treatment of holiday pay in December, as the public holidays approached. And despite Ms. Mikhail's protestations to the contrary, the company's own documentary evidence demonstrates unambiguously that the company reduced Mr. Khattak's weekly shifts shortly after he complained. The company did not provide any adequate explanation for having done so, such as a decline in business, or some other serious problem affecting Keromena's operations.

20. In the absence of such an explanation, and given the burden of proof that, pursuant to subsection 74(2) of the Act, lies upon Keromena, I must conclude that at least a part, if not a major part, of the rationale for the reduction in hours was Mr. Khattak's recent complaint about the lack of holiday pay. The company responded swiftly, on January 2, 2005, when Ms. Mikhail informed Mr. Khattak of his reduced shifts. That was the first reprisal. Less than four weeks later, Mr. Khattak was dismissed following an admittedly heated but otherwise unremarkable argument with Ms. Mikhail in her office. Ms. Mikhail's rather disproportionate response of termination suggests her reaction was borne out of other considerations than simply her upset about the applicant's criticisms of her management style. In fact, she admitted she had wanted to dismiss the applicant three weeks earlier, for reasons not clearly apparent. Again, the company has not discharged the burden of proof under subsection 74(2) in explaining the termination. I therefore find that Ms. Mikhail's decision to terminate the applicant constituted the second reprisal against him because he requested the company to comply with the Act.

21. I turn to the issue of remedy. Mr. Khattak is entitled to compensation for the direct consequences of the breach by Keromena. The company raised no serious challenge concerning

the applicant's attempts to mitigate his damages. He looked for non-skilled work and was rejected by several employers. He went about improving his qualifications in information technology, and searched on the Internet for employment in that field. Despite his efforts, he was only able to find gainful employment a year after his termination from Keromena. Fortunately for the applicant (and, for that matter, the company), his new employment is remuneratively far superior to the level of compensation he earned at Keromena, and thus the period of his damages ends at the point he began working at MGA. Accordingly, assuming that the applicant worked on average 42 hours per week for the company before his shifts were reduced in January 2005, at a rate of $7.44 per hour ($7.15 plus 4% vacation pay), he is entitled, with one caveat, to lost wages for the period from the date of his termination to the date he was employed at MGA: $17,498.88 (56 weeks x average of 42 hours per week x $7.44). From that amount, one week's wages of $312.48 should be deducted in respect of the week Mr. Khattak was studying for his examination and presumably was not employable on a full-time basis.

22. The applicant is also entitled to compensation for lost wages arising from Keromena's unlawful reduction in the applicant's hours of work, from January 3, 2005 until his termination on January 27, 2005. I calculate that loss as follows. The reduction amounted to the loss of 40 per cent of Mr. Khattak's average weekly hours of 42 per week: 16.8 hours per week. He experienced this loss over a three week period. Accordingly, he is entitled to compensation of $374.98 (16.8 x 3 x $7.44)

23. I decline to order the payment of vacation pay sought by the applicant. The evidence disclosed that he received vacation pay, folded into his hourly rate.

24. There was no evidence to support the allegation that Mr. Khattak did not receive meal periods every five hours. I therefore make no order in that regard.

25. For reasons stated earlier, I also decline to order wages for the period of training at the commencement of Mr. Khattak's employment with Keromena.

26. There is some question as to whether or not Keromena is in compliance with the public holiday provisions of the Act in relation to its other employees. The evidence was not conclusive on this point. In any event, the employees in Keromena's workplace ought to be made aware that they are permitted to raise concerns about their rights under the Act without fear of reprisal. Therefore, it is appropriate to order Keromena to post the attached Notice to Employees in its workplace.

Disposition

27. I hereby order Keromena to pay Mr. Khattak compensation pursuant to the company's breach of section 74 of the Act in the amount of $17,561.38, minus any statutory deductions that may be remittable by Keromena.

28. I further order Keromena to post copies of the attached Notice to Employees in its workplace in a location or locations where it is likely to come to the attention of Keromena's employees. The copies are to remain posted for 30 days from the date of this decision.

29. I remain seized to deal with any issues arising out of the implementation of my orders.

Appendix "A"

THE EMPLOYMENT STANDARDS ACT, 2000

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

Following a hearing before the Ontario Labour Relations Board, your employer, Keromena Holdings Ltd. ("Keromena") was found to have made two reprisals against a former employee, Muhammad Jamil Khattak, because he raised concerns about Keromena's practices in connection with public holiday pay under the *Employment Standards Act, 2000* as amended ("the Act").

Generally, employees in Ontario are entitled to the minimum protections prescribed by the Act, including the observance of public holidays with pay, or public holiday premium pay when they are required to work on public holidays.

Employees are also entitled to exercise their statutory rights without fear of reprisals by their employers. This includes raising any question about their rights and entitlements under the Act. Employers are prohibited under the Act from penalizing employees who do so, and may be subject to legal proceedings and orders of compensation if they violate the law.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 19 day of April, 2006.

3930-05-G Labourers' International Union of North America, Local 625, Applicant v. **LaSalle Backhoe Services**, Responding Party

Construction Industry Grievance – Practice and Procedure – Two days after filing a grievance, the applicant advised the Board that the parties had agreed to adjourn the scheduled hearing to a date some six weeks later – The applicant specifically stated it was not consenting to "otherwise extend any time limits provided in the Board's Rules" – Although the responding party failed to file a timely Request for Hearing and Notice of Intent to Defend (Form A-87), the contact between the parties suggested to the Board that the responding party had expressed interest in the matter – The Board declined to proceed to determine the matter (issue a default judgement) without giving the responding party a further opportunity to file a Form A-87 together with the requisite fee – Matter deferred

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; March 10, 2006

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended ("the Act") that was filed with the Board on February 28, 2006. According to the certificate of delivery filed by the applicant, the referral and the other associated documents were delivered to the responding party by facsimile transmission on February 28, 2006.

2. The Board, on March 1, 2006 issued the Confirmation of Filing of Referral of Grievance to Arbitration and Notice of Hearing (Form B-67). The Board had scheduled the hearing in this matter for March 14, 2006.

3. Counsel for the applicant, by letter to the Board dated March 2, 2006 advised the Board that the parties had agreed to adjourn the hearing that had been scheduled for March 14th to April 27, 2006. Accordingly, the Registrar, by letter to the parties dated March 3, 2006 advised the parties that the hearing had been rescheduled to April 27, 2006.

4. The letter from counsel for the applicant stated:

> We have been contacted by the responding party who advises that the principal of the Employer is out of the country and will not be returning until around the 24th of April, 2006. The responding party has requested our consent to adjourn this matter until after that date. The applicant has agreed to adjourn the hearing in this matter until April 27, 2006. We have not consented to otherwise extend any time limits provided in the Board's Rules.

It is clear from the letter from counsel for the applicant that the responding party had requested the applicant's consent "to adjourn the matter" until after April 24, 2006. The applicant, according to its counsel's letter, had only agreed "to adjourn the hearing in this matter". His letter concludes by noting that the applicant had "not consented to otherwise extend any time limits provided in the Board's Rules."

5. As of this date, the responding party has not completed and filed a Request for Hearing and Notice of Intent to Defend/Participate (Form A-87), one of the forms delivered by the applicant to the responding party together with the grievance referral. It appears to the Board that the responding party, by contacting counsel for the applicant and seeking an adjournment of the scheduled hearing, has expressed some interest in this matter. While it is clear that the applicant had agreed only to adjourn the hearing and had not agreed to waive or extend the time within which the responding party had to file a Form A-87, the Board is not prepared to proceed to determine this matter at this time even though it is clear under the Board's Rules the Board is entitled to do so. The applicant did specifically indicate in its referral that the Board make a determination of the matter without a hearing if the responding party failed to file a Request for Hearing and Notice of Intent to Defend/Participate (Form A-87). The applicant did state that it wished to have a hearing scheduled in order to determine the quantum of damages. A hearing will therefore proceed on April 27th whether or not the responding party files a Form A-87.

6. If the responding party does wish to dispute the claims made by the applicant, it must file a Request for Hearing and Notice of Intent to Defend/Participate (Form A-87). Since the hearing in this matter has been adjourned to April 27, 2006 on consent and as the responding party promptly contacted the applicant to seek an adjournment of the hearing on the grounds that its principal is out of the Canada and will not be returning until April 24th, the Board is prepared to defer consideration of the applicant's request for a default determination for one more week to permit the responding party to file a Form A-87 together with the requisite fee. If the responding party fails or refuses to do so on or before March 17, 2006, then the Board will proceed to deal with this matter in accordance with Rule 36 of the Board's Rules.

7. This panel of the Board is not seized with this matter.

2590-05-R; **2784-05-U** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **Mews Chevrolet Limited**, Responding Party; Mews Chevrolet Limited, Applicant v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Responding Party

Certification – Intimidation and Coercion – Standing – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two

parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

BEFORE: *Kelly Waddingham*, Vice-Chair.

DECISION OF THE BOARD: March 10, 2006

1. This is an application for certification (Board File No. 2590-05-R) and an application (Board File No. 2784-05-U) brought by Mews Chevrolet Limited ("Mews Chevrolet") pursuant to section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") alleging that the responding party ("CAW") had breached sections 5, 76 and 77 of the Act.

2. On November 8, 2005, a representation vote was held in which the CAW was successful. On November 16, 2005, Mews Chevrolet filed a section 96 application alleging that representatives of the CAW intimidated its employees into voting in favour of the CAW in the representation vote. Mews Chevrolet's position is that no other remedy, including the taking of another representation vote would be sufficient to counter the effects of the CAW's alleged misconduct, and that the certification application should therefore be dismissed under section 11.1(2) of the Act. In the alternative, Mews Chevrolet asks the Board to order a second representation vote.

3. The Board received submissions from the CAW requesting the summary dismissal of Mews Chevrolet's allegations on the following basis: that Mews Chevrolet did not have standing to bring its section 96 application; in the alternative that it had waived its right to bring such an application; and finally that no *prima facie* case had been pled in respect of intimidation and coercion. The Board requested written submissions from Mews Chevrolet regarding the CAW's request for a summary dismissal of its section 96 application. On January 13, 2006, the Board issued a "bottom line" decision on the issues of standing and waiver, finding that Mews Chevrolet had standing to bring its section 96 application and that they had not waived their right to bring their complaint. The Board requested further written submissions from Mews Chevrolet on CAW's submission that no *prima facie* case had been pled. This decision sets out the reasons for the Board's earlier ruling regarding standing and waiver, as well as the Board's decision that there are insufficient facts for the Board to dismiss the certification application or order a second representation vote.

Standing

4. The CAW submits that no employees affected by the application raised any issues regarding the representation vote after having had the opportunity to do so. The CAW relies upon *Federated Building Maintenance*, [1979] OLRB Rep. Oct. 974, and *Steeves & Rozema Enterprises*, [2003] OLRD No. 450 for the principle that an employer has no independent standing to bring allegations of irregularities in respect of the voting process in an application for certification.

5. Mews Chevrolet submits that it was unaware of the CAW's alleged unlawful activities prior to the representation vote. Mew Chevrolet argues that the CAW has confused procedural and substantive rights under the Act and distinguishes the case law relied upon by the CAW on this basis.

6. Mews Chevrolet submits that its complaint is regarding a substantive right under the Act, that no trade union can intimidate or coerce any person to become a member of a trade union. Mews Chevrolet submits that it is a party to the certification application and argues that it has the legal right to make representations and complaints to the Board about the conduct of any person in connection with the certification application. Mews Chevrolet submits that it has the legal right to make a statement of representations to the Board in connection with the certification application and that the complaint forms part of Mews Chevrolet's Statement of Representations. Mews Chevrolet asserts that it is an interested person under section 11.1(2) of the Act, as the outcome of the certification application will have a direct effect on Mews Chevrolet if the Board ultimately issues a certificate.

7. I agree with Mews Chevrolet's analysis that their complaint deals with a substantive right for an employee not to be subjected to coercion or intimidation during an organizing campaign, and not a procedural right such as proper notice of a vote.

8. I agree that Mews Chevrolet is a party to the certification application, and therefore has a right to make submissions to the Board.

9. Section 11.1(2) of the Act provides:

> (2) In the circumstances described in subsection (1), on the application of an *interested person*, the Board may, despite subsection 10(1),
>
> (a) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or
>
> (b) dismiss the application for certification if no other remedy would be sufficient to counter the effects of the contravention.

10. I find that an "interested person" in section 11.1(2) includes both employees and employers. The Act distinguishes between "employee," "person" and "interested party/persons" in a number of sections (see, for example, section 144, 48(18)(19)). This is not a casual use of either word. Certainly, an employer is a party to a certification application and will, if the application is successful, be required to enter into collective bargaining with the union.

11. Perhaps more importantly where there is an allegation of intimidation it is imperative that these allegations come to the attention of the Board. The Board dealt with a similar fact situation as the present case in *St. Michael Shops of Canada Limited,* [1979] OLRB Rep. April 346, in which the union argued that the employer lacked status to bring a complaint that during an organizing drive employees in the bargaining unit were subjected to intimidating tactics by the union. The Board found that the employer as a party to a certification application may bring forth evidence which might raise a doubt as to the reliability of the membership evidence. At paragraph 8 the Board held:

> To insist that employees alone may raise allegations of intimidation by a union would create an anomalous situation. The more effective the intimidation might be the less likely the Board would be to hear of the violation as its continuing effect could deter the employees from lodging a complaint.

12. For the aforementioned reasons, I find that Mews Chevrolet has standing to bring its complaint.

Waiver

13. The CAW argues that if Mews Chevrolet has the right to bring its application, Mews Chevrolet has waived its right because it executed a waiver document certifying that the voting has been properly conducted during the course of the Board's process. The CAW argues that the execution of the document is the basis upon which the ballot box is opened and the ballots are counted. The CAW submits that it is an abuse of the Board's process to allow the employer to impugn the conduct of the vote with the allegations in the application. The CAW relies upon *Bermay Corporation,* [1980] OLRB Rep. Feb. 166 and *Canadian Red Cross Society,* [1994] OLRB Rep. Nov. 1592, cases in which the Board refused to allow the employer to resile from its agreement that there were no voting irregularities and dismissed the employer's allegations on this basis.

14. Mews Chevrolet states that the waiver has no application to them as they did not agree "the application" be dismissed or that "a final certificate is to issue". In the event that Mews Chevrolet had agreed that a final certificate should issue, the waiver would not prevent Mews Chevrolet from bringing an application under section 11.1(2) of the Act, as it would only affect Mews Chevrolet right to "rely upon information they knew or ought to have known up to the date of the agreement". Further, Mews Chevrolet submits that it did not know or ought to have known about the union's illegal conduct prior to the execution of the worksheet. Finally, at the post vote regional certification meeting held on November 30, 2005 the complaint was added as a matter in dispute between the parties.

15. Mews Chevrolet distinguishes *Bermay Corporation* (supra) from the present case on three basis:

i) the employer's objection to the union's scrutinizer is a procedural objection, whereas Mews Chevrolet's complaint is substantive;

ii) the employer was aware of the facts surrounding the procedural objection (the identity of the union's scrutineer at the vote) prior to executing the worksheet; conversely Mews Chevrolet was unaware of the facts which gave rise to its complaint at the time that the worksheet was executed;

iii) the worksheet in *Bermay* stated that "we hereby waive any objection as to the regularity and sufficiency of the balloting." Conversely Mews Chevrolet submits that no such language exists in the present worksheet.

16. Mews Chevrolet distinguishes *Canadian Red Cross, supra*, on the basis that the employer had knowledge of the facts at the time of the vote and prior to signing the consent and waiver. Mews Chevrolet was unaware of the facts at the time that the worksheet was executed.

17. Mews Chevrolet submits that both *Bermay Corporation, supra*, and *Canadian Red Cross* (supra) support the proposition that employers have standing to bring a complaint in connection with certification applications.

18. There is only one waiver contained within the "Certification Worksheet" which states as follows:

> *** The parties acknowledge that their agreement to dismiss this application for certification, or their agreement that a final certificate will issue, means that they will not be able to rely on any information they knew, or ought to have known, up to the date of the agreement, in order to request another representation vote, to certify the union, or to dismiss the application under subsections 11(1) or (2) of the LRA, 1995 or sections 11 and 11.1 of the *Labour Relations Statute Law Amendment Act*, 2005 [Bill 144].

19. On November 8, 2005, the day of the representation vote, the parties did not agree to either dismiss the certification application or that a final certificate would be issued to the CAW, as there were two outstanding status disputes. On November 30, 2005, at the post vote meeting Mews Chevrolet's section 96 application was added as matter in dispute between the parties and again there was no agreement to either dismiss the application or issue a final certificate.

20. An agreement that the certification application would be dismissed or that a final certificate would be issued is a prerequisite to a waiver to the right to request another representation vote or to the right to request that the Board dismiss the application pursuant to section 11.1(2) of the *Act*. The "Certification Worksheet" was executed by Mews Chevrolet at the vote on November 8, 2005 and at the post-vote meeting on November 30, 2005 without an agreement to dismiss the application or issue a certificate, because there was no agreement, there is no waiver. Therefore, I find that Mews Chevrolet has not waived its right to file its application pursuant to section 11.1(2) of the *Act*.

The *Prima Facie* Case

21. In the application under section 96 of the Act, the CAW submits that Mews Chevrolet has not pled facts which if proven, would amount to a breach of the Act. The CAW asks that the

unfair labour practice complaint be dismissed on the basis that a *prima facie* case has not been made out at this stage of the proceedings. CAW also submits that the Board may only rely upon the facts set out in the application, and not those additional facts set out in its response to the CAW's motion to dismiss the application because Mews Chevrolet has failed to plead a *prima facie* case. Mews Chevrolet did not reply to this submission. Mews Chevrolet is entitled to respond to CAW's argument to dismiss the application, but the Board will not consider additional facts plead by Mews Chevrolet in its response.

22. In *International Union of Bricklayers and Allied Craftworkers*, Board File Nos. 1645-98-U and 1768-98-U, decision dated February 19, 1999, [1999] O.L.R.D. No. 1492, the Board summarized the approach to be used when determining whether to dismiss an application because it does not disclose a *prima facie* case. The Board stated at paragraphs 4 and 5:

> 4. The test that a responding party must meet in order to persuade the Board that an application should be dismissed on the basis that there is no prima facie case established in the application is, in my view, a strict one. An applicant should not be deprived of the opportunity to have a hearing on the merits of his or her application simply because the argument is novel or the circumstances giving rise to the application are unusual. In Caravelle Foods, [1983] OLRB Rep. June 875 the Board characterized the test a responding party must meet in seeking to have an application dismissed on a prima facie motion in the following terms at page 881:
>
> > "The words 'prima facie case' in section 71 are meant to allow the dismissal of a case without a hearing where the allegations are insufficient to render reasonable or arguable a conclusion that the Act has been breached."
>
> In J. Paiva Foods Ltd., supra, the Board set out the test at page 691 as follows:
>
> > "The Board's discretion to dismiss a complaint on the grounds that it does not disclose a prima facie case should only be exercised in the clearest of cases, that is, when the Board is satisfied that there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged."
>
> 5. Where, however, the Board is satisfied that the responding party bringing the prima facie motion has met the burden imposed, it is incumbent on the Board to dismiss the application, thereby conserving the limited resources of the Board for matters that do require a hearing. As Mr. Justice Grange said in Shaw v. McLeod, (1982), 35 O.R. (2d) 641:
>
> > "I concede that on this motion if, after a careful review of the law, the Court determines that he [the Plaintiff] cannot possibly succeed, then his action should be mercifully dispatched."

23. In its written submissions, Mews Chevrolet asserts that Technicians David Riendeau, Eric Turcotte, John Coldwell and Al Lowen solicited support for the union on the company's premises during the CAW's organizing campaign.

24. Technicians perform vehicle maintenance and repair work. They are fully licensed by the province of Ontario. Technicians have the ability to recommend to management which Lubers and/or Apprentices should be offered apprenticeships or whose employment should be terminated for lack of technical ability to perform work.

25. Lubers perform lube, oil and filter changes and vehicle maintenance work. Lubers are viewed as entry level positions and must work very closely with Technicians and Apprentices to perform their duties and learn the job. A Luber's career path is primarily to be accepted into an apprenticeship program and become an Apprentice and eventually a Technician.

26. An Apprentice performs vehicle maintenance and repair work and is required under the Apprenticeship requirements to work under the direction of a Technician until fully licensed. Apprentices perform the same work as Technicians under the Technician's instruction and supervision.

27. Riendeau, a Technician is a prominent member of the CAW's organizing team. Mews Chevrolet asserts that the employees whom Riendeau approached during the CAW organizing campaign feared him.

28. Riendeau is alleged to have:

> i) told some employees that the failure of the last application was because of the Lubers and Apprentices; that he knew how the Lubers and Apprentices voted in the last vote and that Kevin St. Denis did not vote in favour of the union;
>
> ii) told employees that he would be scrutinizing the vote and would know how people voted;
>
> iii) along with Riendeau, Coldwell and Loewen told employees that he would not be helpful if employees did not sign a union card;
>
> iv) directed employees to get others to sign the union card;
>
> v) told some employees that if the union was unsuccessful that their employment as well as his would be terminated because Rob Mews was going to "clean house," or do a "clean sweep";
>
> vi) told one employee that if he supported the union he would be granted an apprenticeship, but if he refused to support the union he would not be granted an apprenticeship. Riendeau, Coldwell, Loewen told the employee that if he did not vote for the union, he would be a "luber for life," and would never go to school;

The union is alleged to have told employees that:

> vii) they would be guaranteed a three to four dollar raise for supporting the union.

29. On January 25, 2006, the Board received correspondence from an employee with an attached petition signed by 28 employees advising that cards were signed and ballots were cast in favour of the union out of fear, as outlined in Mews Chevrolet's unfair labour practice complaint. The relief requested is either refuse to certify the union or order a second vote. This is exactly the relief requested by Mews Chevrolet. I do not consider this a proper timely statement of representations filed by employees because the Board's decision directing the vote which was posted in the workplace is clear that any person who wishes to make representations to the Board about the representation vote must do so within 5 days of the date on which the vote is taken. The vote was held on December 5, 2005, this submission was filed with the Board on January 25, 2006, approximately 6 weeks later.

30. In addressing the employer's allegations, there are two issues which must be determined. First, is the alleged remark a contravention of section 76 of the Act which states:

> No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

Second if the remark is a contravention of the Act, is the remark such that the true wishes of the employees in the bargaining unit have not been reflected in the representation vote as Mews Chevrolet has sought a remedy under section 11.1(2) of the Act which states:

> **11.1** (1) Subsection (2) applies where a trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions contravenes this Act and, as a result, the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote.
>
> (2) In the circumstances described in subsection (1), on the application of an interested person, the Board may, despite subsection 10(1),
>
> (a) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or

31. The Board focuses on objective facts and not the subjective beliefs of particular employees. The Board reviews the circumstances of each case and, on the facts presented determines whether the statements objected to are of such a nature that they would deprive the employees of the ability to express their true wishes.

32. Riendeau's demands that fellow employees sign union cards and recruit other employees to sign cards, are not a contravention of the Act, as this recruitment was for the purposes of obtaining a representation vote and would have no effect on the final secret ballot cast by an employee.

33. There is no evidence as to which union representative made the guarantees of salary increases. Voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is, see *Northfield Metal Products*, [1989] OLRB Rep.

Jan 57; *Kraft Canada Inc.*, [1997] OLRB Rep. Mar./Apr. 239. Management determines salary rates and increases. Union representatives are not members of management, and have no ability to carry out their guarantees of a salary increase.

34. Similarly, Riendeau's threats that both his and other employees' employment would be terminated if the union was unsuccessful because Rob Mews was going to "clean house," or do a "clean sweep," are not plausible to a reasonable voter, who understands that Reindeau is not a member of management who has any information about how the employer would react if the union was unsuccessful. Only management has the power to implement a threat regarding a "clean sweep," in which employment is terminated. It is one thing for an employee who has no ability to carry out what could be perceived as a threat to job security, it is quite another situation if the threat was made by the employer. The employer did not make this threat.

35. Riendeau's promise of an apprenticeship to one employee; and his and fellow technicians Coldwell's and Loewen's threats that a particular employee would be a "luber for life," could if proven, be a contravention of the Act, because Technicians may materially effect the employment relationship of Lubers under their responsibility. However, a reasonable voter would understand that the secrecy of the ballot box assures the integrity of the expression of voters' wishes. *Guelph Wellington Association for Community Living*, [2000] OLRB Rep. July/Aug. 621. Even if an employee felt pressured into signing a card, this does not automatically mean that that person is incapable of casting an independent secret ballot.

36. The secrecy of the representation vote is underscored by the Board's "Notice of Vote and Hearing" which is posted in the workplace and states:

> **SECRET BALLOT**
>
> The vote will be by secret ballot. The Officer conducting the vote will issue a ballot to voters who present themselves to vote at a polling place. Voters will mark their ballot in secret in a voting booth, fold it and deposit it in the ballot box provided at the polling place.
>
> DO NOT SIGN, NUMBER OR OTHERWISE MARK YOUR BALLOT IN SUCH A WAY AS TO REVEAL YOUR IDENTITY.
>
> IF YOU BELIEVE THAT YOU MAY HAVE SPOILED YOUR BALLOT, SPEAK TO THE OFFICER BEFORE DEPOSITING IT IN THE BALLOT BOX.
>
> VOTERS ARE ENTITLED TO VOTE WITHOUT INTERFERENCE, RESTRAINT OR COERCION.

37. The secret ballot insures that a promise of an apprenticeship, or threats of a career limited to being a "Luber" based on how an employee voted cannot be executed. A reasonable voter would know that there is no possibility that the Technicians could have any knowledge of how they voted in a representation vote.

38. Regardless, this possible intimidation was against one Luber. The results of the representation vote, a win for the CAW with 22 ballots cast in favour of the CAW and 15 ballots against the CAW, would not have been changed if the secret ballot did not reflect the true wishes of this one employee.

39. Having regard only to the allegations made by the applicant in the section 96 complaint, I am satisfied that even if proven, the Board would not exercise its discretion under section 11 of the Act to either dismiss the application for certification, or direct that a second representation vote be held. I find that even if the employer's allegations are proven, the actions of the union did not result in employees being deprived of the ability to express their true wishes. In the circumstances, a certificate will issue. There is no need to deal any further with the union's motion to dismiss the s.96 application. The s.96 application (Board File No. 2784-05-U) is remitted back to the parties.

40. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all employees of Mews Chevrolet Limited in the City of Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed for the school vacation period.

41. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

42. A certificate will issue to the applicant.

43. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

44. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.

0966-00-HS; 2311-00-HS Ontario Public Service Employees' Union, Applicant v. **Ministry of Transportation, Ministry of Labour**, Responding Parties; Ontario Public Service Employees' Union, Applicant v. The Crown in Right of Ontario (Ministry of Transportation), Ministry of Labour, Responding Parties

Occupational Health and Safety Act **– Work Refusal – OPSEU appealed an Inspector's decision not to make an Order requiring the Ministry of Transportation (MTO) to provide OC (pepper) spray to its Transportation Enforcement Officers (TEOs), arguing this was contrary to section 25(2)(h) of the *OHSA* – The Union also appealed the Inspector's decision not to treat a work stoppage as a work refusal under section 43 of the *OHSA* – The Board held that under section 25(2)(h), it is not every precaution which must be taken by an employer, but only reasonable precautions – Determining what is reasonable involves**

balancing the benefit to be gained by taking the precaution against all other relevant factors, including the cost of the precaution and its effect on efficiency – The Board established that the magnitude and the frequency of the risk of assault were relevant considerations in determining whether the provision of OC spray was necessary – The circumstances under which OC spray could be used were exceedingly rare – Further, deploying OC spray contradicted the MTO disengagement policy – Accordingly, the Board concluded that the issuance of OC spray was outside the range of reasonable precautions that the employer was required to take – The Board exercised its discretion not to make any decision with respect to the work refusal – Five years had passed between the work refusals and the conclusion of the hearing – Given that the work refusals were primarily about whether OC spray should be provided, and the merits of the TEOs' complaints were dealt with by the inspectors in a relatively short period of time, there was little benefit to be gained by deciding the work refusal issue so long after the fact – Appeal dismissed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Ronald Davis* for the applicant; *Sean Kearney* for the Ministry of Transportation; *Brian Fukuzawa* and *Bridget Lynett* for the Ministry of Labour

DECISION OF THE BOARD; April 4, 2006

1. Board File No. 0966-00-HS is an appeal by a trade union, the Ontario Public Service Employees' Union ("OPSEU" or "the Union") of the decision by a Ministry of Labour Inspector not to make an Order against the responding party, Crown in Right of Ontario (Ministry of Transportation) (the "employer"). It is also an appeal of the decision of the Inspector not to treat a work refusal by Paul Dunseith, a Ministry of Transportation employee, as a work refusal under the Act. Board File No. 2311-00-HS is an appeal by OPSEU against the decision by an Inspector that a work refusal engaged in by another Ministry of Transportation employee, Jean Guy Paquett, was not a work refusal under section 43 of the *Occupational Health and Safety Act* (the "OHSA").

2. Both applications arise out of a claim by OPSEU and some of its members, including Mr. Paquett and Mr. Dunseith, that pursuant to s.25(2)(h) of the Act, the employer must provide Transportation Enforcement Officers ("TEOs") employed by the Ministry of Transportation with Oleoresin Capsicum spray ("OC spray"), which is commonly known as pepper spray, and appropriate training in its use. The Board held hearings over a considerable period of time to receive the evidence and arguments of the parties with respect to these issues.

Overview

3. Mr. Paquett and Mr. Dunseith are TEOs with the employer. They are represented in their employment relations by OPSEU. In 1997 or 1998 the Government decided to step up its enforcement of truck safety regulation as a result of a number of incidents on the province's highways involving trucks. As part of this new enforcement regime, TEOs were given the power to impound unsafe trucks.

4. The employer and the TEOs perceived that TEOs may face more antagonism and an increased risk of assault from truckers as a result of their new powers. The employer sought

advice regarding the tools TEOs might be provided to increase their safety. The employer commissioned a former police officer, Ted Montgomery, to investigate what protective steps should be taken. The former police officer's report, the "Montgomery Report", recommended that TEOs be provided with new defensive tools: batons, handcuffs, a kevlar vest, and OC spray.

5. The employer provided TEOs with all of the recommended tools except OC spray. The decision to provide OC spray to TEOs was held off pending a broad Government review of when and to whom in the Government pepper spray should be issued. The review took a long time and Mr. Dunseith instituted a work refusal. The Ministry of Labour Health and Safety Inspector who was called, decided to treat the work refusal as a complaint rather than a work refusal under s.43 of the Act. Later Mr. Paquett also instituted a work refusal that was again treated by the Ministry of Labour Inspector as a complaint.

6. These applications were commenced.

7. Eventually, the employer commissioned a new report regarding whether OC spray should be issued to TEOs and the parties agreed to adjourn these applications pending its release. That report, the "Quinlan report", recommended that OC spray not be issued to TEOs. Accordingly, these applications proceeded.

Factual Background

8. Many of the background facts are not in dispute and accordingly the parties reached a partial agreed statement of facts.

9. To supplement the agreed facts the parties also called several witnesses. OPSEU called three current and former TEOs, including the two who staged the work refusals. The employer called a witness to testify about how it came to the decision not to issue OC spray to TEOs. It also called Jay Quinlan, the author of the Quinlan Report. Little of the oral testimony is in dispute.

TEOs' Duties and Authority

10. TEOs enforce and ensure compliance with legislation, regulations and industry standards to maintain the safe, efficient and legal operation of all types of vehicles on the highway system. TEOs enforce both Federal and Provincial highway safety legislation. They are designated as an "Officer/Inspector" under the *Highway Traffic Act* (the "HTA"). They also have authority and responsibilities under several other pieces of legislation such as the *Provincial Offences Act* and the *Transportation of Dangerous Goods Act*.

11. In addition, approximately 90 per cent of TEOs are certified to carry out "Critical Defect Inspections" pursuant to s. 82.1 of the HTA. Section 223 of the HTA provides that the Minister of Transportation, "May appoint one or more persons on the staff of the Ministry"... as an officer/officers for the purpose of carrying out all or any of the provisions of this Act, and the person so appointed has authority to act as a constable throughout Ontario for the purpose."

12. The definitions in s. 1(1), of the HTA, provide that "peace officer" includes "any officer appointed for enforcing or carrying out the provisions of this Act."

13. In addition, a TEO has the following authority under the HTA:

- A TEO has the power to detain a motor vehicle with which an offence has been committed (s. 217(4)).
- A TEO may, pursuant to section 225(1) enter any place of business during normal business hours to inspect the records of the business required to be kept by the Ministry and remove any of those records to make copies thereof.
- The HTA also gives TEOs the power to detain a commercial motor vehicle and seize the permit if they have reason to believe it is being operated with a suspended Commercial Vehicles Operations Registration ("CVOR") or without a permit or certificate or one that has been suspended. (s. 20(2))
- In addition, where the TEO determines that the vehicle is in a dangerous or unsafe condition, he/she may prohibit its operation until it has been placed in a safe condition and seize the number plates and/or permit.
- Subsections (2) and (3) of s. 82.1 also give TEOs the power to require commercial motor vehicles to stop for inspection and to direct them to another location where the inspection will be carried out or continued.

14. Broadly speaking TEOs engage in four major enforcement activities: mobile patrols, manning of vehicle inspection sites, inspection of garages and home inspections of owner operators. Regardless of what enforcement activity a TEO is engaged in, a major activity of a TEO is driver and vehicle inspection. This inspection can be conducted in two portions. The driver inspection portion includes the audit of documents that a driver is required to complete and carry while operating a commercial vehicle on the highway such as hours of work, invoices, bills of lading, dangerous goods documentation and safety marks, vehicle registrations, insurance and various licensing requirements. The vehicle portion is an inspection of mechanical vehicle components for defects. A TEO conducts commercial vehicle inspections at the roadside or at a fixed truck inspection station. On rare occasions, a TEO may inspect a vehicle at the operator's premises.

15. Inspections can take from one-half hour to one and one-half hours or longer to perform. The more defects present on the vehicle, the more tickets have to be issued, and the longer it takes. Given that transportation is generally under tighter timelines than it was before the Government's road safety crackdown (with just in time delivery, etc.) this could be onerous for the driver. It also could have employment or business consequences for the driver.

16. TEOs are trained to perform both moving stops and stationary stops of commercial motor vehicles in accordance with enforcement procedures. The stationary stop requires the TEO standing by the highway to signal the commercial vehicle to stop where directed by the TEO. A moving stop requires the TEO, through the use of his/her vehicle's lights and other signals, to direct the commercial vehicle to stop by the side of the road where it may be inspected. The TEO may also, after having stopped the vehicle, direct the driver to proceed to another location for an inspection.

17. Once a truck is stopped, enforcement procedures provide that the TEO shall contact the Com Centre (OPP central dispatch/communication centre) and provide the Com Centre dispatcher with the truck's vehicle identifier (i.e. plate number), location of the stop and the expected duration of the inspection. The Com Centre will advise the TEO of the vehicle status. It is now Ministry of Transportation policy that a TEO shall not stop or inspect a commercial motor vehicle in any area where there is no or inadequate radio contact with the Com Centre. That policy was not in effect at the time of the work refusals. At the time there were radio "dead zones", i.e. locations where a TEO could not be in radio contact with the Com Centre. These dead zones were of concern to TEOs especially in Northern Ontario.

18. Following receipt of the advice regarding the vehicle's status, the TEO approaches the cab of the vehicle and asks the driver to provide him with those documents required according to the type of vehicle that is being operated. These include the driver's licence, insurance, registration, driver's log book, shipping documents, dangerous goods documents, CVOR trip inspection, and any other required documentation.

19. The TEO then returns to the cruiser to radio the Com Centre again to request a "CPIC" check of the vehicle's driver. CPIC is a service known as the Canadian Police Information Centre which provides the criminal records of individuals to authorized personnel. CPIC records indicate criminal convictions, whether the individual has assaulted peace officers in the past, whether they are known to be violent or exhibit aberrant behaviour, and provides categories of the charges and information concerning any outstanding warrants against the individual.

20. If an individual does have an outstanding warrant for a serious criminal charge or one within the geographic jurisdiction where the TEO is conducting the inspection, the Ministry of Transportation has no policy that expressly instructs the TEO what steps they are to take next.

21. Mobile patrols are normally conducted by a single TEO. These patrols involve random stops and inspections of commercial vehicles which can range from small trucks used for deliveries to tractor trailers. Commercial vehicles subject to inspection include trucks and trailers with a gross vehicle rate over 4,500 kg; motor coaches; school purpose vehicles and physically-disabled-passenger vehicles (a bus or van for transporting the physically disabled).

22. Mobile patrol is conducted in a marked enforcement vehicle which looks much like a police cruiser. With few exceptions, an enforcement vehicle is a four-door passenger car. It is white with green and gold ministry markings. Typically, it is retrofitted with: flashing red and amber emergency lights on the roof or mounted on the front bumper and rear window deck; a siren; a protective partition between the front and rear passenger compartments, and; two-way radio communications. Some enforcement is also conducted using similarly equipped passenger vans. The Ministry also operates a number of vehicles that do not bear the typical markings of an enforcement vehicle. These vehicles are used to attend court, transport officers to assignments and meetings, and for administrative purposes. Vehicles that do not bear typical markings are not used for enforcement activities. Some mobile enforcement is also conducted from a mobile truck inspection station ("MTIS"). An MTIS is a large van outfitted with inspection tools, warning lights and ministry identification. When used for enforcement, the MTIS is parked on or near the

roadside and commercial vehicles are directed to stop for inspection. The operation of the MTIS involves more than one TEO.

23. After stopping a vehicle (by whatever means) the TEO must then determine what level of inspection to conduct with respect to the vehicle. Levels of inspection range from merely reviewing the documentation for compliance with the various regulations, to various types of physical inspections up to and including a "Level I CVSA" inspection which is a thorough physical inspection of the vehicle, the load and all driver documentation, conducted pursuant to the protocol of the Commercial Vehicle Safety Alliance. The TEO may also direct the vehicle be driven to a truck inspection station in order to check the vehicle weight and to perhaps carry out a more thorough inspection. If a violation is detected, it is Ministry of Transportation policy that the TEO shall use good judgement and discretion when deciding on whether to issue a warning or lay a charge. The TEO shall inform the driver in a concise, intelligently phrased statement of the violation and if appropriate, issue the offence notice and explain court procedures.

24. TEOs have a range of enforcement powers, including the power to issue summonses under Part I and Part III of the *Provincial Offences Act*, depending on the nature of the infraction. These summonses, if contested, require appearance in Provincial Offences Court and can result in fines and/or imprisonment as a result of a conviction. Other powers of enforcement include the power to impound vehicles for "critical vehicle defects", drivers' licence suspension, and impounding of vehicles for repeat infractions of the *Compulsory Automobile Insurance Act* which may register the vehicle as unfit for mechanical safety.

25. Where a TEO discovers a vehicle operator whose driver's licence has been suspended due to convictions under certain sections of the *Criminal Code*, the TEO can impound the vehicle and may lay a charge under the HTA or may call on the police to lay criminal charges for driving with the suspended licence. The period of impound is 45 days on the first occasion, 90 days for the second and then 180 days on the third occurrence pursuant to s. 55 of the HTA.

26. In addition to the power to issue summonses for violations of the HTA and its Regulations, a TEO has the power to declare a commercial vehicle "unfit" by stamping the vehicle permit with the word "unfit" and by seizing the plates from the vehicle. Such vehicles are not permitted to be operated until the vehicle has been repaired and inspected at a certified motor vehicle inspection station and the proof of the inspection is brought to the local licence issuing office of the Ministry.

27. If a TEO finds that the commercial vehicle has a "critical defect" pursuant to the HTA, the TEO will ask another TEO to confirm that a critical defect is present. If a critical defect is confirmed, the TEO shall notify the Registrar of the findings. The Registrar may then issue an order to impound. Upon receipt of an order to impound the TEO shall seize the plates and arrange to have the vehicle impounded.

28. For six years there has been a joint MTO-Ontario Provincial Police enforcement initiative in portions of Northern Region (East-West along Highway 17 from Mattawa to Blind River; Highway 11 south to Gravenhurst and North to Cochrane; Highway 69 from Parry Sound to Sudbury). The primary focus of this venture is to increase enforcement of unsafe commercial vehicles, buses, and aggressive driving. In 2002, there were nine teams comprised of one TEO and one OPP officer. Each team schedules a joint operation one day per week for five months, primarily during the winter. Patrols are conducted in either the OPP cruiser or the MTO

enforcement vehicle. However, given the amount of equipment associated with commercial vehicle inspections, the MTO enforcement vehicle is the primary mode of transportation for the joint operation. On occasions, Officers in the team will each operate their respective vehicles. Commercial vehicles are stopped and inspected at fixed locations and at the roadside. Private vehicles are also stopped for aggressive driving. In addition, teams conduct public education and deliver group presentations to raise awareness of road safety issues.

29. OPP officers also deal with any other violations they observe during the joint initiative, as well as respond to emergency calls from the OPP dispatch. In order to ensure the safety of all officers, guidelines have been developed to address the responsibilities of each participating officer during joint operations. These guidelines incorporate and reinforce existing MTO enforcement procedures. In particular, a TEO is directed to disengage from any enforcement action that poses a safety risk. If a commercial vehicle refuses to stop as directed, the pullover is to be abandoned. The guidelines also provide that a TEO – like any citizen – shall assist the OPP officer in the execution of his/her duty in arresting a person, if so requested, pursuant to section 129 of the *Criminal Code*. The MTO has documented one such incident, approximately three (3) years ago, when an OPP officer who was affecting an arrest requested the assistance of his TEO team-mate.

30. Trucks are not the only target for the MTO OPP pilot project. All motorists who violate the *HTA* and other legislation are subject to being stopped in the project. For example, an OPP news release dated March 15, 2000 states that "joint teams" from various towns in north-eastern Ontario are involved in stopping "all vehicles for aggressive driving and inspecting commercial vehicles for unsafe use." Statistics reported for February, 2000 were that 531 commercial vehicles were checked, 123 other vehicles were stopped and that charges were laid, including moving and non-moving violations. Still, it remains MTO policy that any TEO participating in the joint initiative is not empowered to ticket moving violations. The role and mandate of the TEO in the joint initiative team is restricted to the enforcement of legislation and standards specific to the safe operation of commercial motor vehicles.

31. Some TEOs, who possess a certificate of qualification as an Automotive Service Technician, conduct investigations and inspections specific to Motor Vehicle Inspection Stations (MVIS). An MVIS is licensed by the ministry to certify the safety of vehicles at the time of sale or for compliance with the Ontario's Periodic Mandatory Inspection Program. In this particular role, a TEO may attend at the opening or closing of an MVIS or investigate public complaints relating to the safety inspection requirements for these vehicles. These investigations can range from telephone inquiries, to visits to the inspection station, and inspections of the vehicles in issue. These investigations are conducted in order to ensure that safety standard certificates are being issued in accordance with the applicable regulations and, in particular, that unsafe motor vehicles are not being certified as safe.

32. If an investigation discloses that the requirements of the relevant regulations are not being met, the owners of the station may be fined or have their licence to operate a motor vehicle inspection station revoked. The mechanics who were involved may also be subject to fines or have their authority to inspect vehicles and issue safety standards certificates under the MVIS program revoked. These provisions are enforced through the issuance of summonses under Part I or Part II of the *Provincial Offences Act* requiring that the mechanic and/or licensee appear in Provincial Offences Court to answer the charges. The summonses are served by the TEO on the

mechanic and/or licence holder either personally or by registered mail. These investigations are usually conducted by a TEO working alone.

33. On major highways, there are truck inspection stations at which trucks are directed by signs on the highway to enter, be weighed and inspected. The inspection process followed is similar to that in a mobile patrol.

34. In addition to performing the duties of a TEO, those employees who are classified as TEO III perform facility audits pursuant to the HTA. These audits are detailed reviews of the numerous records required to be kept by owners of commercial vehicle operations, ranging from a single vehicle to multi-vehicle operations. In cases where falsification of records, or failure to keep proper records is discovered, the commercial vehicle owner is subject to fines and/or potential jail sentences.

35. In addition to conducting audits, the TEO III reviews the outstanding fine status of the operation with the owner and seeks to arrange for prompt payment of any fines. If fines remain outstanding, the Ministry of Transportation may proceed with sanctions, up to and including a sanction against the owner's fleet involving the withdrawal of vehicle registrations for all of the owner's vehicles for a period set by the Registrar.

36. The audits are conducted on the business premises of the owner which can range from the owner's residence to a commercial office building. Under the HTA the TEO III is authorized to enter the place of business of any operator for the purpose of inspecting these records and to remove the records to make copies if necessary. If a TEO III is concerned about his or her safety by attending at the operator's residence or office, the TEO III may ask the operator to attend with his/her records at a Ministry location. However, there is no legislative authority to enforce attendance.

37. At the time of the work refusals at issue, when performing their duties on the premises of commercial vehicle owners, some TEO III's had no portable radio contact with the dispatch centre. In some cases, TEO III's were provided with alternate means of communication, such as a cell phone. TEO III's in the South-western and Central Region now have access to a portable radio linked to the dispatch OPP communications centre via an in-vehicle radio repeater. These new portable radios are equipped with an emergency button which, when depressed, automatically notifies the communication centre that the TEO requires assistance. The TEO III's in the Eastern and Northern Regions are to receive the same equipment this year in accordance with the Ministry's agreement with the service provider and other participating government agencies.

38. If a TEO III discovers falsification or failure to keep appropriate records, they may serve the summons on the vehicle owner at the completion of their audit or by registered mail. In addition to the provincial offence charges resulting from an audit, facilities that fail the audit may be subject to sanctions from the Registrar against their commercial vehicle operations. The TEO III must explain the consequences of the charges and any areas of non-compliance found during the audit to the owner at the conclusion of their audit. A final rating is assigned by the Carrier Sanctions and Investigation Office.

TEO Safety Concern History

39. After an incident on August 10, 1995, a TEO commenced a work refusal under the OHSA with respect to the risks of roadside stops. The employer formed a committee consisting of labour, management and health and safety staff to investigate these risks and the committee agreed to conduct a survey of TEOs to identify the risks associated with vehicle stops. A questionnaire concerning vehicle stops which TEOs made over the preceding three years was sent out to all TEOs.

40. The questionnaire was sent out by Mr. Hans J. Johns, an Enforcement Co-ordinator in Kitchener, on October 31, 1995. 158 TEOs (of 220, or 71.8%) responded. The respondents reported a total of 8 physical assaults involving 7 TEOs. There were also 13 instances where drivers either used objects (tire irons, pieces of wood) to threaten drivers directly or used such objects in a threatening manner.

41. When the Government began considering increasing the power of TEOs, it was aware that the exercise of these new powers could increase the risk to TEOs. Accordingly, at the request of the Carrier Safety and Enforcement Branch, the MTO Audit and Evaluation Services Branch (AESB) conducted a Control and Risk Self-Assessment of the proposed roadside suspension program. In its report dated April 1997, the AESB recorded and analysed the comments and discussions of 52 participants including management and TEOs.

42. The participants were asked to consider two options: one involving the impounding of vehicles; and the second involving the suspension of vehicle plates. The participants identified that the physical harm to TEOs and confrontation between drivers and TEOs were among the high impact/high likelihood risks of a vehicle impound option, as well as a plate suspension option. Among the risk mitigation strategies put forward by participants was the provision of protective equipment and training to the TEO "i.e. batons, pepper spray or mace".

43. Following the release of the AESB Report in 1997, the MTO asked a team of its employees, the "Safety and Regulation Improvement Team" ("SRIT"), to review the risk of assault in both the enforcement officer and driver examination officer job functions. The recommendations of SRIT included a recommendation that the training for protective equipment or self-defence needed to be benchmarked to other jurisdictions and that the MTO seriously consider adding protective equipment, including pepper spray and batons.

44. The TEO and the Ministry's concerns about safety came further into focus when, on January 26, 1998, Mike Weir, Director, Carrier Safety and Enforcement Branch of the MTO, sent a memorandum to all TEOs announcing the introduction of the Commercial Vehicle Impoundment Program (CVIP). Director Weir also advised that he had "directed the CVIP team" to investigate and propose appropriate implementation of a number of measures, including communications equipment upgrades, panic alarms, surveillance equipment and self-defence training and equipment.

45. Director Weir also made two further announcements concerning risk mitigation. The first was that a consultant would prepare a study of the enforcement program to determine the needs for self-defence training and equipment (the Montgomery Report). He also reported that a legal opinion had been received that the TEO is "clothed with all the rights, powers and protection afforded to a peace officer by the *Criminal Code* for the purpose of enforcing the *Highway Traffic Act*."

46. Although the Montgomery Report was completed in June of 1998, it was not until January of 1999 that it was released to TEOs as a result of a Ministry of Labour order requiring its release.

The Montgomery Report

47. The Ministry engaged A.F. Montgomery and Associates to:

- Identify and assess the types of risk being experienced by TEOs;
- Identify and assess potential mitigation strategies;
- Identify and assess potential training strategies.
- Assess and recommend strategies to minimize lists.

48. Mr. Montgomery interviewed TEOs and supervisors. In addition, he visited twelve truck inspection stations across Southern Ontario, and interviewed randomly selected TEOs on area patrol. Following this work, Mr. Montgomery observed: "The number of actual assaults, along with being negatively confronted when off duty in public places, reported during the interview process should be a cause for alarm."

49. Mr. Montgomery reported that "there is sufficient anecdotal evidence from the officers interviewed to indicate that the incidence of confrontation is growing and will continue to do so", and added "The Ministry must take a proactive stand on this issue". Among other things, Mr. Montgomery recommended that the MTO issue protective vests to all enforcement personnel. He further recommended that the MTO issue handcuffs, pepper spray and batons to all TEOs, accompanied by mandatory training and certification and annual re-certification in the use of those self-defence tools.

50. At the time that it was required to release the Montgomery Report, the MTO Carrier Safety and Enforcement Branch also issued a "response" to that report which stated in part, in respect of the recommendation to issue vests, handcuffs, pepper spray and batons: "Further review is required to validate the need for issuance. These tools are considered aggressive, rather than defensive and provide opportunities for use against our officers".

51. Later, the employer decided to issue protective equipment (excluding OC spray) to TEOs. TEOs were also provided training in the use of the new protective equipment. This did not take place until approximately April 1, 2000. However, TEOs were provided with self-defence training prior to that time.

52. At about the same time, the Ministry changed its view regarding whether TEOs had "Peace Officer" status. Previously the parties had agreed that such a designation would be beneficial to the protection of TEOs because it would increase the consequences of an assault on a TEO. However, the Ministry obtained a legal opinion that TEOs were not peace officers.

53. On June 28, 2000 Management Board Secretariat ("MBS") provided a "Protocol" on the issuance of pepper spray within the Ontario Public Service which outlined a procedure which

various Ministries were recommended to follow to "determine, justify and defend" the issuance of pepper spray.

54. At the hearing in the appeal of Mr. Dunseith's work refusal, which was scheduled for March 1, 2001, the Employer advised that it was in the process of retaining a consultant (Mr. Quinlan) to conduct a "risk and needs" assessment for TEOs in accordance with the MBS Protocol. Accordingly, the parties agreed to adjourn the hearing and follow the process set out in the adjournment agreement in which the union would provide the employer with its comments on draft terms of reference, questions and the consultant's report.

55. The employer provided the applicant with a draft of the Quinlan report dated July 2001 and the union provided extensive comments in a letter to the respondent dated August 29, 2001.

56. The Quinlan Report recommended that the employer maintain its present use of force equipment without implementing the OC spray "at this time". The Quinlan Report and the evidence of Mr. Quinlan is discussed in detail below.

Employer's Use of Force Policy

57. A fundamental element of the employer's case is that the employer's Use of Force Policy which governs TEOs makes it clear that if TEOs are in danger or feel uncomfortable in any way they are to "disengage". That is, they are to cease their inspection activity and remove themselves from the situation. Therefore, under the employer's analysis, TEOs are to use their defensive tools, in particular the baton, only when they are unable to disengage or when they must come to the aid of another TEO who is being assaulted. Use of force is to be considered only as a last resort, and, as a practical matter, this means that force is almost never used.

58. The following parts of the Use of Force Policy are relevant:

> Enforcement officers are not expected to jeopardize their own health and safety during the course of their duties.
>
> When conducting enforcement action at night, in isolated areas, an officer shall:
>
> a) Record the particulars of the vehicle and the situation before leaving the cruiser, and if possible
> b) Use his/her in-car communication systems to keep co-workers or supervisor informed of the situation
> c) Remember that contact with a driver/owner/operator must be performed in such a manner so as to avoid the initiation or provocation of conflict.
>
> In the case of immediate, unavoidable risk of physical violence, as a consequence of initiating or pursuing enforcement action, an officer shall:
>
> d) Remove himself/herself from the situation.

> e) Report details of all incidents of abuse, both verbal and physical to his/her supervisor, in accordance with section EP 1.1.3, pgs 26-29 "Reporting Use of Force and/or Assault".
>
> Officers must abide by every provision of the Code of Practice EP 1.1.3. Failure to do so may expose the officer to personal risk. Failure to abide by any provisions of this code will result in discipline up to and including dismissal.
>
> This section provides the authority, policies and procedures related to the justified and reasonable use of force by Enforcement Officers, for their personal safety. By virtue of this ministry policy, an Enforcement Officer must make every effort to disengage or void a violent confrontation before considering any use of force. Use of force is to be considered only as a last resort. In accordance with the Ontario Use of Force Response Options Model (see appendix "A"), the officer shall select the most reasonable and available option, relative to the situation. Response options include: officer presence, tactical communications, empty hand techniques, use of expandable baton and disengagement.
>
> . . .
>
> Although Section 27 of the C.C.C. [*Canadian Criminal Code*] authorises an Enforcement officer to use force to "prevent the commission of an offence", officers are restricted to using force only when they experience or witness the offence of "assault" on a law enforcement officer or other ministry employee.
>
> Accordingly, Enforcement Officers will be justified in the use of force only when, during the lawful execution of their duties:
>
> a) they have been physically assaulted or witnessed the physical assault of another Enforcement officer; or
>
> b) they have been threatened by a verbal or physical act or gesture and have reason to believe that physical assault is imminent; and
>
> c) their belief is based on reasonable grounds, they are confident the person has the ability to commit an assault and they are unable to disengage from the situation.
>
> . . .
>
> Enforcement officers shall only consider using a baton where disengagement is not an option, and lower levels of force are inappropriate or ineffective. Officers are legally authorized to use as much force as is necessary under the circumstances, and where the force used is excessive or inappropriate, they can be held criminally accountable for their actions. Inappropriate use of the baton, or failure to abide by any of the provisions of this Code of Practice, will also result in discipline up to and including dismissal. Any use of the baton should be consistent with ministry training and policy.

59. TEOs are not given direct training about the disengagement policy. However, as part of their training, TEOs are given training in a Use of Force Response Options Model. The Model puts the trainee in the position of an officer who is faced with a series of behaviours and describes the range of responses that are appropriate for these behaviours. The Model, which was designed for police purposes, is a graphic representation of officer response options to various levels of resistance encountered from a client, depending upon the circumstances. The options portrayed on the Model range from simple officer presence, through self-defence techniques to the use of a firearm (which TEOs do not have) and total disengagement.

60. On the other hand, the TEOs who testified gave evidence about some confusion about the Ministry's disengagement policy. Mr. Dunseith testified that he had not been given training or instructions regarding how to disengage. However, he understood that the option to disengage was always available if the TEO deems it to be necessary. He testified that it is a judgment call by each TEO and they should disengage if they feel that there is a threat.

Training

61. There was considerable evidence about the training TEOs receive. TEOs receive training in "tactical communication" (communication, both verbal and non-verbal, intended to identify problems before they happen and defuse problems without resort to physical reasons), self defence training and use of defensive tools.

62. I do no agree with this part of the applicant's claim that the training is inadequate, except with respect to one aspect; that is the TEO's subjective belief that OC spray is necessary. I am satisfied that the tactical training provided is adequate. I do, however, believe that disengagement training should be provided.

The Quinlan Report

63. The Quinlan Report was put into evidence and Mr. Quinlan testified about it.

64. It was not disputed that Mr. Quinlan is an expert in the use of OC spray. He is a former police officer who has, since his retirement from policing, specialized in the use of force. He was recognized as an expert and gave expert evidence at the Asia-Pacific Economic Co-operatives ("APEC") inquiry on the police use of OC spray against protestors of the APEC summit.

65. Mr. Quinlan conducted an extensive survey of TEOs to identify the risks they face. It included both written and oral questionnaires. He also travelled with TEOs to some degree to learn about their responsibilities and the challenges they face on the job. Based on the results of that survey and his knowledge of TEOs' responsibilities and the Ministry's disengagement policy, Mr. Quinlan's opinion was that TEOs ought not to be provided with OC spray.

66. In his report Mr. Quinlan analyzed the main tools currently provided to TEOs. The Quinlan report states that the baton is designed to end confrontations either by psychological means (through its removal from the holster and expansion) or by striking the target. The report notes a study of a police unit found 95% of officers surveyed stated the opening of the baton imposed "significant psychological impact on the client".

67. It is clear, based on Mr. Quinlan's report that it would be difficult, for a TEO to employ both a baton and OC spray in an incident where the TEO is being rushed by an attacker. That is because to be used properly, OC spray should be surreptitiously removed from its holster and concealed in the hand. The spray would only be used if the client attacked. It would be difficult and perhaps impossible for the TEO to draw his/her baton after using the spray.

68. The Quinlan report also notes that OC spray is not guaranteed to subdue. An individual can "overcome [to spray] with positive attitude alone". At least two police forces conducted testing demonstrated a 12% or higher failure rate in the use of OC spray.

69. The Quinlan report relies on research, which concluded that the "primary value of OC is in controlling actively resistant people", not those who are assaultive. In fact, research described in the report suggests that in a substantial percentage of cases, OC spray makes individuals more aggressive not less, although, this aggression may occur while the individual is blinded, which was an advantage to law enforcement. Another report showed that 20% of persons sprayed began to run around aimlessly, blinded, after being sprayed.

70. Through surveys, Mr. Quinlan sought to identify the assault risk to TEOs. Twenty-one per cent of TEOs surveyed had to call the police for assistance at least once during the preceding year. In Northern Ontario such police support can be up to three hours away. Seventy-two per cent of the TEOs surveyed said they had encountered occasions with threat potential over the previous 5 years. Additionally TEOs were asked how many times they felt at risk of being physically assaulted over the previous years. The vast majority said they had, with a significant number reporting more than five occasions.

71. TEOs were asked questions about threats with weapons. Approximately fifteen per cent of those interviewed recalled situations where weapons were displayed in order to threaten or intimidate. The most common was a tire iron used to hit the vehicle's wheels or which was slapped into the hand while the driver followed the TEO around the vehicle. These situations were all resolved through tactical conversation (talking the driver into putting the weapon down) or through disengagement. Finally, approximately seventeen per cent of TEOs reported verbal threats and intimidation happening over ten times over the previous year.

72. Mr. Quinlan also asked TEOs about client inflicted physical injuries. A few injuries were reported, none of which resulted in lost time. In one instance a TEO's arm turned red after being grabbed by a driver. In another instance, a TEO got a bump on the head after a driver threw a clipboard at him. Another TEO received counselling after being threatened.

73. The Quinlan Report compares those injuries to the approximate number of client contacts made by TEOs over the same period. In that respect, there were 871,200 client contacts over the period which in Mr. Quinlan's calculation results in a rate of one assault causing injury for each 217,800 client contact.

74. Mr. Quinlan also identified the number of TEOs who had been resisted, threatened and assaulted prior to receiving the defensive tools and compared those with the number of similar incidents after the provision of the tools. He concludes that there has been improvement in all categories of misbehaviour and substantial improvement in some of them.

75. Finally Mr. Quinlan analyzed the number of times TEOs had used their weapons or applied force since 1998. (Handcuffs and batons were only provided in the year 2000, approximately one year before the report was written). He found that batons had been drawn nine times and expanded one time. (In addition the Board heard other evidence that a baton had been forcefully used only one time – against a dog.) There were five instances of physical blows (empty hand strike) and 9 instances of handcuffs being applied.

76. Mr. Quinlan concluded that TEOs do not often encounter serious resistance or use force. However, the figures were not substantially lower than those encountered by Canadian police officers.

77. Mr. Quinlan also identified other agencies that were provided with OC spray, and compared the duties of the employees in those agencies to the duties faced by TEOs. (I note that while it is unclear why he selected the jurisdictions he did, OPSEU did not suggest any malevolence in his choices.) Out of the six provinces surveyed, TEOs in two, Alberta and Saskatchewan are provided with OC spray. In Alberta TEOs have special constable status and have a limited power to make arrests. It also appeared that the Alberta department's membership in a United States law enforcement organization influenced its decision to provide OC spray. In Saskatchewan TEOs have been provided OC spray since the year 2000. However, TEOs in that province have peace officer status, can make arrests pursuant to warrants, and detain truckers for criminal code offences. TEOs also execute warrants for other law enforcement agencies, which Mr. Quinlan deemed a policing function.

78. The report also examined some American jurisdictions which are not necessary to review in detail. The employer relied on the facts surrounding one such jurisdiction, Oregon, which had in 1997 provided OC spray to its transportation officers, then removed it as it was rarely used.

79. A number of other Canadian agencies provide OC spray to some of their employees:

> a) Ontario Corrections – provided to correction officers on escort duty to prevent assisted escapes. It may also be used inside a correctional facility although usually only for the purpose of quelling a disturbance.
>
> b) Canada Customs and Revenue Agency – When Officers are assigned a role with respect to warrants and impaired drivers, officers were given OC spray.
>
> c) Ministry of Natural Resources Conservation Officers – however, they have the power to arrest persons on firearms charges.

80. The Report states the following in finding against the provision of OC Spray:

> The next consideration is when tactically would officers deploy Oleoresin Capsicum in a confrontation. Some officers are correct in their assumption that Oleoresin Capsicum is often considered a 'soft intermediate' weapon. As such it is designed for controlling lower levels of threat and resistance at the 'Active Resistance' stage. This is a stage at which Ministry of Transportation policy and training clearly dictates that where safe to do so the officer shall disengage from the individual. It must also be born in mind that Oleoresin Capsicum is not suitable as a quick draw weapon. Once an assault is in

progress, drawing Oleoresin Capsicum afterward can be a tactical folly for at least two reasons:

1) It enables the offender to have an easier ability to strike while the officer is pre-occupied in trying to get the spray out thereby resulting in the officer receiving unnecessary injuries.

2) If the officer manages to get the spray out it is now going to have to be used at an extremely close range. This is a guarantee of full cross contamination due to the pressure creating a splash back effect or cloud (dependent on the type of nozzle) which might restrict the officers ability to further defend themselves. The mean average number of officers who are not prepared to be sprayed in training is 47.75%, almost half the organisation. Based upon experience, a number of those who are somewhat prepared to be sprayed would change their minds once training commenced further increasing the number of officers who would experience being sprayed for the first time in the field under adverse conditions. From the police experience we know a number of those officers may get hurt from inappropriate actions after being sprayed.

In addition to the two reasons above there is concern over injury to the eyes of the client who is sprayed at close range. Any aerosol product when sprayed at close range into the eye has the potential of causing cornea damage. If an injury were to result, the officer would potentially be investigated to ensure the reasons for close proximity spraying were reasonable in the circumstances, if it were deemed not reasonable then the officer would be liable.

There is both strong anecdotal and statistical evidence to support the premise that officers have a 'perceived need' of Oleoresin Capsicum. On close examination of the facts, it is evident that the 'real risks' do not support this perception and the circumstances in which officers operate are inconsistent with the issue of this weapon.

In addition to the above, it is the author's opinion that the issue of Oleoresin Capiscum is not applicable at present to the Ministry of Transportation unless the present mandate of the officer's function was to change. That change would require officers to be routinely enforcing laws in which an arrest was required and from which the officer had to maintain a presence and from which disengagement was not always an option. The present option of baton is more applicable and reliable for dealing with assaultive actions by clients based upon the present mandate.

81. Based on his survey and other information he made the following conclusions:

a) that TEOs "experience infrequent occurrences of resistance from clients of a nature that would require a physical response";

b) that a majority of TEOs feel that OC spray is not necessary;

c) that in any event, OC spray is not an appropriate tool for TEOs given the TEOs' mandate and the Ministry's disengagement policy.

The Oral Evidence

82. Paul Dunseith worked in the MTO from 1967 to his retirement on October 30, 2002. For most of his employment he was a mechanic. However, for approximately 5 years before he retired he was a TEO. He was a union official for much of his employment, including as a union representative on the OHSA Advocacy Committee.

83. Mr. Dunseith gave evidence about matters that were largely agreed to by the parties. This included evidence of the various reports and progress that have been made to improve TEO safety. This evidence is incorporated (to the extent necessary) without attribution in other sections of this decision. It is to be noted that the lengthy history between the parties regarding TEO protection and Mr. Dunseith's view of it contributed to his belief that a work refusal was necessary.

84. Mr. Dunseith also gave evidence about an assault incident in which he was involved. On January 6, 2000 he was at work in Erin, Ontario and he and two other TEOs were conducting roadside inspections. The inspection was being conducted in front of a restaurant. All of a sudden the restaurant's chef, apparently upset because he believed the inspections were hindering his business, came out of the restaurant and started screaming profanities at Officer Dunseith. Officer Dunseith attempted to explain, but the chef continued his abuse and bumped Officer Dunseith's chest with his chest. Mr. Dunseith told the chef that he had been assaulted and called the OPP. The OPP attended and talked to both parties and suggested to the TEOs that they should conduct the inspections further up the road. No charges were laid.

85. This was the only occasion in five years as a TEO that Officer Dunseith was assaulted.

86. Mr. Dunseith also testified about an incident in which another TEO who was conducting an inspection, requested assistance because the driver was being abusive. As soon as Officer Dunseith came to the other TEO's assistance the driver calmed down. There was no physical assault.

87. Mr. Dunseith also testified that there were occasions in which drivers left their cabs while he was inspecting their trucks. On these occasions he directed them to return to their cabs. They did not always comply.

88. He also testified that in his experience 1 in 20 drivers have a criminal record. One in 50 of those criminal records will involve violence. For particular individuals CPIC may ask the TEO if he/she wishes police assistance. Other than the one incident involving the chef, Officer Dunseith never asked for police assistance.

89. Mr. Dunseith also testified about the employer's Use of Force policy. He testified that he received no training or instruction on disengaging other than the option to disengage was "always available if [the TEO] deemed it to be necessary". It is a judgement call by each TEO if he/she felt there was a threat.

90. Finally, Mr. Dunseith gave evidence about his work refusal. On the day in question, May 26, 2000 he was assigned to conduct area patrol. He was the only TEO in his cruiser. It is certain that Officer Dunseith was going to be conducting a number of stops that day. There would likely have been stops in a radio dead zone.

91. He had several reasons for his work refusal:

(i) there were radio dead zones where TEOs did not have communication with dispatchers;

(ii) inadequate training in dealing with violent operators;

(iii) he believed OC spray should have been provided;

(iv) he believed that there should have been protective cages in vehicles to prevent an arrested subject from attacking the driver.

(v) he believed he should have been provided with a reflective vest.

92. Officer Dunseith advised that he was refusing to work pursuant to the OHSA. Officer Dunseith and his supervisor were able to resolve a number of his concerns, however, several issues remained unresolved. Ministry of Labour Inspector Michael Hutz was called and investigated on May 26, 2000 and June 5, 2000. On June 5, 2000 Inspector Hutz made his decision. He found that the circumstances were likely to endanger Officer Dunseith with respect to training provided on safely stopping a moving commercial vehicle and the failure to provide traffic control vests for use when stopping vehicles, which are not at issue in this case. The Inspector also found that s. 43(3) of the Act did not apply to the other issues (radio communication issues, pepper spray, protective cages in vehicles, inadequate training in dealing with violent offenders) because, in his view, they constituted the "hazard of physical assault", which did not constitute the "physical condition of the workplace" under s. 43(3) of the Act.

93. Under cross-examination Mr. Dunseith testified that May 26, 2000 was no different from any other day in that the hazards which gave rise to his work refusal existed on every day prior and every day following that date (until equipment was introduced which reduced and eliminated some of the hazards he complained of). He testified that he believed it was unsafe to work without OC spray even though he had never used the defensive tools he was already provided.

94. He acknowledged that he had approximately 1380 client contacts each of his five years and had faced only the one assaultive incident which is described above.

95. He also acknowledged that on May 3, 2000 he caused to be distributed to all TEOs a hazard report which he and others drafted which stated:

> OPSEU
> HAZARD ALERT
> FOR
> ENFORCEMENT OFFICERS
>
> Enforcement Officers are advised that they may not be adequately protected from on the job violence when pulling carriers off the road for inspection.
>
> It is the OPSEU Provincial Health and Safety Committee's view that enforcement officers are not being provided with sufficient protection where the full complement of enforcement tools and training have not been provided by the employer.

INADEQUATE SAFETY PRECAUTIONS

To date the programs suffers from several deficiencies. These include: 1) inadequate tactical communications training – this involves methods for defusing potentially violent situations; 2) absence of "pepper spray" and training in its use; 3) Consistent and reliable radio communication; 4) inadequate staffing.

WHAT CAN YOU DO TO PROTECT YOURSELF?

It is the Committee's view that workers must use the rights available in the Occupational Health and Safety Act for their own protection. One of the most important rights is the right of self protection – the right to refuse dangerous work.

Under Section 43(3) of the Act, a worker may refuse work that he or she believes is likely to endanger his or her health and safety. Pulling a carrier off the road to inspect the transport in an effort to enforce the several statutes without adequate training and protection from violence is likely to endanger an enforcement officer's health and safety.

How should I exercise the right to refuse if I don't have adequate training and equipment?

Step 1: Before you go out on your assigned duty you must advise your supervisor that you are refusing to perform your regular enforcement duties without adequate training and protection from violence. For example, your tools do not include "pepper spray", proper and effective radio communication, training in how to defuse a violent situation and sufficient staff.
Step 2: Your employer must investigate the circumstances of your refusal in the presence of you and your union representative.
Step 3: If your refusal is not resolved after the employer investigates, a Ministry of Labour Inspector must be called in to investigate
Step 4: The inspector must investigate in the presence of you and your representative and your employer, and must issue a written decision.

At all times the employer must ensure that you remain in a safe place or give you alternative work, but not penalize, threaten or discipline you in any way.

BEWARE THE USE OF FORCE

Enforcement Officers should be aware that you will be held legally liable for any allegations of abuse or use of excessive force.

Enforcement officer are advised of the following:

Don't exercise the "powers of arrest" that the employer suggests you have. You are not a peace officer and your arrest power only resides in your right to perform a "citizen's arrest". Should you encounter aggression or any other violation of the law, call the police!

OPSEU PROVINCIAL HEALTH AND SAFETY COMMITTEE

Don Healey, Chair
Clarence Lehr
Paul Dunseith

96. TEO Jean Guy Paquett was also called as a witness by the union. He has been a TEO and involved with transportation safety issues since 1985.

97. He testified about an incident that occurred in 1986. He issued a ticket, and the driver became angry and kicked a dent in the fender of his patrol car. Prior to that time the driver had given no indication that he was violent. Officer Paquett left the scene and advised his supervisor. No action was taken against the driver.

98. Another incident occurred in 1989. He noticed a vehicle with defective plates and followed it for a period. The vehicle stopped at his demand and he asked the driver for his documentation. Officer Paquett directed the driver to his patrol cruiser and told him he was going to look in the truck's cab at the vehicle identification number. When Officer Paquett turned his back, the driver jumped him from behind. The driver tackled him to the ground, but Officer Paquett was able to kick himself out of the situation. He told the driver to back off so that he could get to his patrol cruiser. The driver complied. After the driver calmed down, Officer Paquett asked the driver why he had assaulted him and the driver told him that he had an envelope full of money in the cab. Officer Paquett got back in his cruiser and left the scene.

99. Officer Paquett's supervisor was out of the office for a week and he waited until his return to report the incident. His supervisor told him to report the matter to the police which he did. The police told him that it was a weak case since he had waited so long to report it. Nothing further came of the matter.

100. Officer Paquett also testified about three incidents that occurred while he was conducting business/home audits. In one case, the driver and his brother were drinking when he attended for the audit. They gave Officer Paquett a hard time and he became nervous and left the house. He called his supervisor who was very supportive of his decision. He ended up not doing the audit.

101. The next incident occurred when he dealt with an individual nicknamed "Scrappy", a very large man who was known to be short tempered, although not in a physical way. Officer Paquett conducted a "kitchen table audit" at a driver's residence and Scrappy became angry, started banging his fist on the table. Officer Paquett felt the situation would escalate if he stayed, so he left.

102. The final incident occurred when Officer Paquett and another TEO conducted an audit at a garage. They arrived and the owner of the garage told them to leave and physically escorted them from the building. They called their supervisor and he contacted the owner and negotiated the TEOs' return to the garage. The TEOs returned to the garage and started the audit which was to take several days.

103. During the audit the TEOs found a number of violations. Upon being informed of this, the owner asked Officer Paquett and the other TEO to leave again. He grabbed Officer Paquett by the arm and physically escorted him to the door. Again his supervisor negotiated a return to the audit. The audit went on for several days but was eventually completed.

104. Finally, Officer Paquett gave evidence about his work refusal.

105. Officer Paquett had and has a significant interest in whether the employer should issue OC spray to TEOs. He was aware that the Management Board Secretariat ("MBS") issued its protocol for the issuance of OC spray in June 2000. He wanted to see whether OC spray would be issued to him under the protocol. Eventually, in September 2000 he filed a health and safety inquiry with his supervisor. He requested that he be issued OC spray.

106. On October 2, 2000 Officer Paquett's supervisor responded to his inquiry. The response was that the Carrier Safety Enforcement Office was to review the MBS protocol to determine whether OC spray was an appropriate tool for TEOs.

107. On October 3, 2000 Mr. Paquett advised the employer that he was engaging in a work refusal. He remained in the office for the day and was eventually advised that a Ministry of Labour Inspector could not come in until after the following morning. On October 4, 2000 the employer advised the other TEOs based at that office of the work refusal. Two other TEOs refused to work.

108. On October 5, 2000 the Inspector issued a decision that the work refusal was "unwarranted". He treated the matter as a complaint. Later he orally advised that in his view the circumstances were "not likely to endanger" and Mr. Paquett returned to work.

109. A third TEO, Rejean Viellault, also testified on behalf of OPSEU. He became a TEO in 1995. He has been a workplace health and safety representative.

110. Officer Viellault testified about his understanding that his performance is measured in part, by how many inspections he does, and that the amount of time it takes to do an inspection varies by the type of inspection undertaken. If the truck being inspected has to be taken out of service, this can take 1½ hours.

111. Officer Viellault was involved in an incident while he was the only TEO on duty in an inspection station. The incident resulted in charges laid by the O.P.P. against a trucker for, among other things, uttering threats, assault with a weapon, disturbing the peace and interference with the judicial system.

112. The incident occurred when Officer Viellault inspected a truck and found that the driver did not have the appropriate licence to operate the vehicle he was driving. Officer Viellault checked CPIC and was told that the driver had a history of violence. Officer Viellault determined that the O.P.P. were not available to assist so he planned to have the driver move his rig to another station where there were two TEOs.

113. When Officer Viellault advised the driver of his concern the driver became very agitated and repeatedly threatened him, "don't charge me, I am warning you." Officer Viellault instructed the driver to go back to his truck and he did. Eventually the driver pulled a metal bar out of the truck's box and hit the truck, causing a dent. The trucker never touched Officer Viellault.

114. On his written report of the incident which he gave to the employer he recorded that TEOs should be provided with pepper spray. He was concerned about the size of the weapon available to the trucker in comparison to the baton that the TEO carries. In his view, OC spray

would have given him an option to get him out of the situation. He testified that at the time the driver picked up the bar, OC spray could have helped him subdue the driver.

115. Officer Viellault also testified that he had asked for police assistance on other occasions, perhaps 2 to 5 times per year. In February 2003 Officer Viellault stopped a driver whom he discovered had two bench warrants for his arrest. He called the OPP who arrived after 15 – 20 minutes and arrested the driver. On another occasion, Officer Viellault suspected a driver had been smoking drugs and called the OPP who inspected the cab, confiscated drugs, and arrested the driver.

116. Under cross-examination Officer Viellault testified that he had thousands of contacts with drivers over his career and that, of these, only very few involved a driver who had even failed to turn over his paperwork. While some delayed complying, they relented eventually.

117. Officer Viellault also testified that he would not likely have used OC spray in any of the incidents in which he had been involved. However, he believed that the OC spray option could have "bought time" for him to remove himself from the situation. He admitted he would not have pepper sprayed the driver banged his truck. Nothing prevented him from disengaging, he just used his judgement to decide to remain and try to defuse the situation. In fact, in the approximately 16,000 stops Officer Viellault has made he had never encountered a situation where he would have used OC spray.

118. The employer called three witnesses Tom Mather, Phil Cooke and Jay Quinlan.

119. Mr. Mather, a Special Project Lead, was assigned to engage the services of a consultant and to otherwise ensure that the terms of the agreement between OPSEU and the employer (which resulted in the adjournment of the first day of hearing of this matter) were complied with. In furtherance of that, Mr. Mather retained the services of Mr. Quinlan, following a request for proposal.

120. Mr. Mather agrees with Mr. Quinlan's assessment of the merits of providing OC spray to TEOs. He is particularly influenced by the fact that the incidents of assault and other inappropriate behaviour against TEOs have declined and were mostly minor in nature since the issuance of Kevlar vests and other tools which make TEOs look like police officers. However, Mr. Mather is not an expert so his opinion is of little, if any, weight.

121. Mr. Cooke was, at the relevant times, either the Manager of the Carrier Enforcement office and the Carrier Safety Enforcement Branch or the head of the Carrier Enforcement Liaison. In the past he has supervised TEOs in Northern Ontario. He was an area manager in 1995 when these issues first were raised.

122. In the role he was in at the time of the incidents he was responsible for operations policy and development for TEOs. This included policy and training related to new legislation and programs.

123. He gave evidence about the training TEOs receive. He also testified about the kinds of incident reports he received as an area manager. There were no assaults; most were dog bites and slip and fall related.

124. Mr. Cooke was quite involved in the Montgomery report from the employer's perspective. He ensured that Mr. Montgomery completed the report, arranged payment to him and prepared an action plan in response to the report.

125. He testified that he was not happy with the report when he received it. He did not believe it was comprehensive enough. However, he believed that aspects of the report – like the recommendation for self defense training – were founded.

126. Mr. Cooke participated in drafting management's response to the Montgomery Report. Management agreed to the issuance of Kevlar vests after learning that many other agencies had adopted them. They also learned that officers had survived car accidents because of the vests. The vests provide protection against blunt objects.

127. Mr. Cooke's initial response to the recommendation for handcuffs and batons was to call those tools "aggressive". Management was also concerned they could be used against the TEO. However, management ultimately sided with the union and the TEOs, in part because they realized the industry standard was changing.

128. In oral evidence Mr. Quinlan did not waver from the conclusions in his report. In fact, if anything, he was more adamant in oral evidence about the inappropriateness of OC spray for TEOs than his report had been.

129. He testified that OC spray is virtually useless as a tool to be used in a threatening manner. That is because if the suspect sees the officer unholster the spray he can largely defend himself by holding his hands in front of his eyes. Therefore, to be used properly OC spray should be removed from its holster as secretly as possible and kept concealed behind the back or in a fist. OPSEU does not dispute this evidence. For this reason, and the fact that the canister is kept in a holster, OC spray is not a "quick draw" weapon. In addition, as discussed above, it is difficult, if not impossible, for the TEO to use her/his baton in addition to employing OC spray.

130. He also testified that OC spray would often be useless because TEOs were likely to be in close proximity to the subject when the need for a defensive response arose. If OC spray is used in close proximity, it is likely to contaminate the TEOs as well as the subject. Moreover, spraying from close range could damage the subject's eyes.

131. The effect of OC spray can vary widely. Twenty-four per cent of people become more aggressive after being sprayed. Others become disoriented. For many there are psychological and physiological effects including acting irrationally and forgetting what they are doing.

132. Mr. Quinlan is quite critical of the Montgomery report. He described it as a "wants" assessment as opposed to a "needs" assessment. Mr. Quinlan is of the opinion that TEOs have no need for handcuffs, vests and batons. His view is influenced by the fact that there have been very few instances of physical violence or even threats towards TEOs and in all of those instances, the TEO had been able to disengage. Mr. Quinlan's conclusion is that the likelihood of injury or physical assault is so small, 217,000 client contacts per injury per year, that defensive tools are not needed.

133. Mr. Quinlan testified that the major reason for his recommendation was that it was contrary to a TEO's mandate. It is a police officer's duty to *arrest* individuals. Except in extreme circumstances they are not to disengage. Even in extreme circumstances, a disengagement is only temporary; the individual *will* be arrested or incapacitated. On the other hand, it is the duty of TEOs to disengage from individuals who they fear may become aggressive or assaultive. OC spray is used to effect an arrest. OC spray is not properly employed if it is used to prevent an offender to escape; the proper use of OC spray is to restrain the subject so that the subject can be decontaminated and arrested. These are not the goals of a TEO. Therefore, the risk when a TEO uses pepper spray is that the unrestrained subject will run onto the highway, or possibly attack the TEO.

134. Mr. Quinlan testified that OC spray could not be used to assist the TEO to disengage. That is because the use of OC spray is contradictory to that objective. Proper use of OC spray requires the TEO to attend to the subject after it is used in order to decontaminate the subject and prevent her from harming herself. That requires engagement not disengagement. Twenty-four per cent of persons display more aggressive behaviour after being sprayed. The risk to the TEO would be increased rather than decreased. For this reason OC spray is used to assist in an arrest, which is not the TEO's mandate.

135. Mr. Quinlan reviewed all of the incidents which were testified to in this proceeding. Like the TEOs themselves, he concluded that OC spray would not have been used in any of them.

Decision

136. The parties identified three issues which they argue the Board is required to be determined in these appeals:

> 1) were Officers Dunseith and Paquett entitled to refuse "unsafe work" in the circumstances and was the refusal a proper refusal under s.43 of the OHSA;
>
> 2) should the Inspectors have found on the date of the work refusals that the circumstances facing TEOs were likely to endanger; and
>
> 3) should the Board order the employer to provide OC spray and appropriate training in its use to TEOs pursuant to the requirement in s. 25(2)(h) that an employer should take every precaution reasonable in the circumstances for the protection of a worker.

137. I will determine the third issue first and then consider the first two issues together.

The Pepper Spray Issue

138. Section 25(2)(h) of the Act states:

> **25.**
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> ...

> (h) take every precaution reasonable in the circumstances for the protection of a worker.

139. OPSEU's argument is based on the assertion that TEOs are engaged in a dangerous occupation, that at the time of the work refusals it was becoming more dangerous and that OC spray would assist them in defending themselves against attacks.

140. The Union argues that the employer's disengagement policy is problematic. Under the policy the TEO is required to make every effort to disengage before considering any use of force. The difficulty is that TEOs may hesitate too long before deciding to disengage and there is the possibility they will make the wrong decision. The use of OC spray provides an opportunity while the subject is at long range to ensure the TEO can disengage.

141. The Union suggests that OC spray could be provided to TEOs to be used in the following circumstances:

> i) when the TEO becomes concerned about a subject because the subject is engaged in active resistance, she can surreptitiously draw the spray canister and hold it concealed;
>
> ii) when it appears to the TEO that the subject is on the verge of becoming assaultive, the OC spray can be deployed;
>
> iii) the TEO can then safely disengage.

142. The employer's argument is based on the limited circumstances in which OC spray can be properly used, the frequency and severity of the dangers faced by TEOs and its appropriateness given their disengagement mandate. The employer also is of the view that the provision of OC spray might increase the risk to TEOs. The employer relies heavily on the Quinlan report and Mr. Quinlan's expert opinion evidence.

143. The employer points to the fact that a TEO has never been seriously injured while on the job, that assaults against TEOs are infrequent and have become less frequent since they were provided with defensive tools, and that no TEO has ever used their baton to strike an individual.

144. The employer also argues that TEOs are not "Peace Officers" and are therefore prohibited from using OC spray.

145. The Ministry of Labour sides with the employer.

146. There is surprisingly little case law on what the word "reasonable" in s.25(2)(h) means. However, on the face of the provision the word "reasonable" clearly modifies the words "take every precaution in the circumstances". Therefore, it is not every precaution which must be taken, but only reasonable precautions. Determining what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors. These factors could include, among other things, the cost of the precaution and its effect on efficiency.

147. There was some suggestion that the severity of the risk and likelihood that the risk will actually occur are not relevant. I disagree. As the Board stated in *Intercept Security Services* [1998] O.O.H.S.A.D. No. 159:

> The language "reasonable in the circumstances" requires a consideration of the magnitude of the risk and its frequency. In this case, I have concluded that if security guards are faced with an armed assailant, they are at great risk, but that the likelihood they will be faced with that risk is small.

148. I am, therefore, satisfied that the magnitude and the frequency of the risk of assault are relevant considerations in determining whether the provision of OC spray is necessary in the circumstances of this case. The fact is that not all risks can be fully guarded against. Were it otherwise this would be a simple case. It is clear that OC spray (or some other suitable spray) could be of benefit to TEOs to defend against bear or dog attack. (This is not so far fetched: TEOs operate in the isolated north where bears can be present at the side of the road and there is evidence that TEOs have been confronted and bitten by dogs when they conduct an audit at an owner/operator's home). However, pepper spray is not sought for these purposes, presumably because the likelihood of a bear or dog attack is so small.

149. I start with an analysis of the frequency and the magnitude of the risks faced by TEOs. Mr. Quinlan's opinion is that TEOs face minimal risks in the performance of their duties. He bases this conclusion on a statistical analysis of the number of assaults reported by TEOs. He concludes that there was only a small chance of a TEO being assaulted. Mr. Quinlan asserts that a TEO can expect to be injured once every 217,800 contacts with clients. Moreover, he concludes that the chance of a TEO being seriously assaulted or injured are even more remote, in that none of the assaults reported by TEOs has ever resulted in a serious injury. However, Mr. Quinlan also acknowledges that there was "more than a mere chance" of an assault and that this fact justifies the need for the existing use-of-force training.

150. I am not nearly so sanguine about the dangers which face TEOs as are Mr. Quinlan and the two responding parties. As the Union points out, another way of interpreting the statistics relied on by Mr. Quinlan is that a TEO can be expected to be assaulted approximately once per year. That is significant. While the Board agrees that the vast majority of such assaults are minor and will be so in the future, it is possible that a TEO could be seriously assaulted or worse in the future.

151. In my view, the Board must be careful in assessing the magnitude and severity of the risk on a purely statistical basis. One could probably create equally impressive statistics about the likelihood of a construction worker being struck in the head by falling debris, yet few would question the benefit or necessity of the requirement that workers wear hard hats on construction sites.

152. I am therefore satisfied that TEOs have the sort of workplace risks which justify the provision of self-defence and other training. Indeed, despite the expert opinion of Mr. Quinlan, the employer itself appears to agree, as it has provided a number of defensive tools and gave no suggestion that it intends to remove them. I am, therefore, also satisfied that the employer ought to continue to provide the existing defensive tools to them. But does the risk, real as it is, require

the employer to provide the additional defensive tool of OC spray in order to satisfy its obligation to take every precaution reasonable in the circumstances?

153. The first difficulty with the Union's position is with respect to frequency of the risk. While, as noted, there is a real risk of assault to TEOs in the performance of their job duties, the risk of an assaultive situation where OC spray could actually be used is much, much lower. In fact, the Union did not call evidence (whether oral or as contained in a written incident report) of a single incident involving a TEO where OC spray, if available, would have been used.

154. On the union's argument, the circumstances under which OC spray could possibly be used are exceedingly rare. It requires that the client be and remain at a safe distance. It requires that the TEO be in a situation where he/she is able to secretly remove the spray from its holster and keep it hidden in the hand. It would only be used if the subject were to actually appear to be commencing an assault. Again, the evidence is that such circumstances have rarely, if ever, arisen. These conclusions are reinforced by the fact that the baton, which could be drawn in a wider range of circumstances, has been used only in the rarest of cases.

155. A further difficulty for OPSEU is that the rare circumstances under which the OC spray would be drawn and employed are also almost the identical circumstances where the TEO could draw a baton. While it is true that the actual use of the baton mandates that the TEO get closer to the subject than the use of OC spray it is also certainly the case that in most situations the subject would not potentially assault the TEO once the baton has been drawn and that the drawing of the baton will give the TEO the opportunity to disengage. This further reduces the risk faced by TEOs.

156. It may well be that the limited frequency of the risk might by itself be fatal to the Union's case. While the likelihood of this situation occurring is difficult to calculate (there being none so far) it is not too difficult to characterize the risk as being on the same magnitude (or less) as a bear or dog attack, that is, something that will occur extraordinarily rarely. It is difficult to see how the provision of OC spray in such circumstances is a reasonable precaution.

157. There are other serious problems with the Union's argument. Using OC spray appropriately, obligates the TEO to engage, which increases the risk to the TEO. The Union's case is predicated on the theory that the TEO could spray the subject and then disengage. However, it did not dispute Mr. Quinlan's evidence that proper use of OC spray would require the TEO to attend to the sprayed individual to decontaminate him/her. To do otherwise would place the subject in danger (he might run onto the road in blind hysteria). Obviously any TEO who attends to the sprayed subject runs the risk of being assaulted while the decontamination process is going on.

158. Deploying OC spray contradicts the disengagement policy. Even if that policy did not exist (OPSEU does not seek, as part of this proceeding, that it be eliminated), the requirement that the TEO attend to the contaminated subject puts him or her in proximity to an individual whom they have already decided to be dangerous without the tools (ie. a gun), the motivation, or often a partner, to lessen or eliminate the danger to the TEO.

159. OC spray also may increase the danger to TEOs because, for in a significant percentage of cases the person sprayed is either unaffected (because, for example, the spray

misses or due to the motivation of the sprayed individual) or is actually made more aggressive by the spray. The difficulty is that if the spray does not work, as a practical matter the TEO may not be in a position to deploy a baton or may be otherwise in a poor defensive position. The time taken to use the spray and to judge its effects may reduce the opportunity for disengagement and may compel hand to hand combat.

160. Moreover, OPSEU had no answer for the evidence given by Mr. Quinlan that OC spray is not a defensive weapon. OC spray is used by police or other enforcement officers to subdue an individual so that they may be handcuffed. The mandate of police and others who carry OC spray is to ensure that law breakers are taken into custody. Disengagement is not an option. TEOs have quite a different mandate. They are there to ensure that commercial vehicles are operated safely. If they perceive a threat, their mandate is to disengage as there is no safety issue which is worth jeopardising the health and safety of the TEO.

161. There is no suggestion that OC spray had been provided to anyone, anywhere, for the purposes advocated by OPSEU.

162. For all of those reasons I conclude that the issuance of OC spray to TEOs is not a reasonable protection in these circumstances. While TEOs are at some risk as they carry out their duties, the degree of that risk which could be reduced by OC spray is extremely minimal and is outside the range of reasonable precautions the employer must take. Moreover, I am satisfied that the minimal benefits of OC spray are actually offset by the additional risk it would place on TEOs.

163. Having said that, during the hearing, it was apparent that there were at least two issues which are of significant concern. The first concern is the employer's disengagement policy. The witnesses were, for the most part, quite clear about the policy, that is the TEO could disengage any time he/she felt in danger and in any event must disengage to avoid use of force where possible. However, the employer's policies do not describe the circumstances under which a TEO can disengage or the form by which disengagement may take place. They merely state that disengagement is to be attempted before use of force. The policy needs to be amended to disclose the circumstances under which a TEO may disengage and how that is to take place. It would also be beneficial to, during regular training times, provide specific training on the disengagement policy. I so order.

164. The Board has a similar concern with respect to another of the tools used by the employer – the use of force model - two versions of which were in effect during the relevant time period. Both have the same problem: they are intended for police officers' use and accordingly include references to firearms that are irrelevant to TEOs and, most importantly, do not include a disengagement option, which is the cornerstone of this employer's use of force policy.

165. I am satisfied that the use of force model currently in use is more confusing than of assistance in a work environment where disengagement is the TEO's most important safety tool. However, the Board cannot direct the employer to either replace the use of force model with an appropriate tool or discontinue its use because that issue is not squarely before the Board. Nevertheless, the Board urges the employer to consider these options and to consult OPSEU as may be appropriate.

Work Refusals

166. The next part of the case presented by the parties focuses on the activities of the Inspector in dealing with the two work refusals which brought the OC spray issue to a head. In this regard, rather than deal with the work refusals as work refusals under s.43 of the OHSA, the Inspector treated the TEOs' concerns as complaints under the OHSA. The Union appeals both the decision to treat the work refusals as a complaint and the Inspector's decision on the merits of the issues which resulted in the work refusal, the primary aspect of which was OC spray.

(Note: para. 167 & 168 doesn't exist)

169. This part of the case focuses on the activities of the Inspector in dealing with the two work refusals which brought the OC spray issue to a head. In this regard, rather than deal with the work refusals as work refusals under s.43 of the OHSA, the Inspector treated the TEOs' concerns as complaints under the OHSA. The Union appeals both the decision to treat the work refusals as a complaint and its decision on the merits of the issues which resulted in the work refusal, the primary aspect of which was OC spray.

170. The Board has carefully considered the issues raised in the application and has decided to exercise its discretion under the OHSA and not make any decision with respect to this aspect of the union's appeal.

171. I come to this conclusion primarily because of the passage of time which occurred between the work refusals in question and the conclusion of the hearings into these matters. In that regard, nearly five years passed from the work refusals until the date these hearings were completed.

172. Given that the work refusals were primarily (although in the case of Mr. Dunseith not exclusively) about whether OC spray should be provided it is difficult to see what the point of deciding these issues is. First the merits of the TEOs' complaints were dealt with by the inspectors, albeit not in accordance with s.43 but in a relatively short period of time. Second, the effect of how the issues were dealt with is that TEOs got an answer to their concerns both by the Inspector and by the Board in this decision. Had the Inspector treated the work refusals as refusals under s. 43 of the Act, the union and the TEOs would be in very much the same position today. This is not to say the Board agrees with the Inspector's decision making, it is just difficult to see what benefit can be gained by deciding this issue, particularly so long after the fact. Third, my decision is also influenced by the fact that neither party sought to expedite this matter.

3034-05-U United Steelworkers 1-2693, Applicant v. **Neenah Paper Company of Canada**, Responding Party

Change in Working Conditions – Interference with Trade Unions – Unfair Labour Practice – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance

with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *S.B.D. Wahl, J. Hanlon* and *J. P. Carrier* for the applicant; *Stephen Shamie, Robert J. Atkinson* and *Robert Baxter* for the responding party.

DECISION OF THE BOARD: March 29, 2006

1. This is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") which alleges that the responding party violated sections 70, 72, 73, 76, 83 and 86 of the Act.

2. The Board scheduled a consultation in this matter for January 27, 2006. At the consultation both parties agreed it was appropriate to make argument based on the written material filed with the Board as there did not appear to be many, if any, facts in dispute. This was in fact done and this decision determines the application.

The Facts

3. The responding party is a pulp and paper company. It has at least two operations, a mill and a woodlands operation. The employees of both operations are represented by a trade union, the applicant. However, this application concerns only the woodland operations.

4. The parties were party to a collective agreement which expired on August 31, 2005. Prior to the expiry of the agreement, on June 2, 2005, the union gave notice to bargain a renewal collective agreement. On July 21, 2005 the union requested the appointment of a conciliation officer and on August 8, 2005 a conciliation officer was appointed. Prior to the appointment there had been no bargaining.

5. The parties met for the first time in conciliation on October 6, 2005. The union provided its proposals, following which the company gave a presentation in which it outlined the losses it had suffered over the previous three years and the fact that further losses were predicted into 2006. The company then presented its proposals for a renewal collective agreement. Among

the proposals was a proposal to reduce compensation costs by 10% in the first year of the collective agreement and then freeze compensation costs at that reduced level for the remainder of the collective agreement. The union advised the company that it wished to consult with its membership before meeting again.

6. On October 13, 2005 counsel for the company wrote the union and advised that it wished to continue negotiations as soon as possible after October 23, 2005. The union responded that it wished to negotiate with other forestry companies first, prior to continuing bargaining with the responding party.

7. The union and the company had traditionally bargained on the basis of pattern bargaining. That is, the parties followed the pattern established by negotiations between the union and other forestry companies. However, the parties agree that the employer responding party was not part of an employers' association with those other forestry companies. Accordingly, the employer's failure to engage in pattern bargaining does not form a direct aspect of this application.

8. On October 27, 2005 the company wrote to the union and advised that the union's decision to negotiate with the other forestry companies before negotiating with it, was "unacceptable". The union maintained its position. Shortly after, the employer asked for a "no board" report from the Ministry. A "no board" report was issued on November 18, 2005. Accordingly, the parties were in a strike/lock-out position on December 5, 2005.

9. The company repeated its willingness and desire to set bargaining dates prior to December 5, 2005, but the union did not wish to meet with the company. Accordingly, the company provided the union with a new proposal under cover of a letter dated November 25, 2005 which stated:

> As you know, the Ministry of Labour has issued the no board report and the legal strike/lockout date and the date for the end of the statutory freeze period is 12:01 a.m., Monday, December 5, 2005.
>
> It has so far been the Union's position that it does not wish to negotiate with the Company at this time. Therefore, it is the Company's intention to declare the current collective agreement to be terminated as of December 5, 2005. The Company would then implement the attached proposal. Accordingly, the Company will then offer continued employment to the employees on the basis of the terms and conditions of employment in the expired collective agreement, with the exception of Article 8 – Adjustment of Grievances, and as changed by the Company's attached proposal. For purposes of implementing the Company's proposal, the changes to vacation in Article 6 and the benefit changes in Article 14 and 19 would be effective January 1, 2006, and the introduction of the Defined Contribution pension would take effect on July 1, 2006. All other changes would be implemented effective Monday, December 5, 2005.
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> We intend to advise the employees of this implementation on December 1, 2005.
>
> However, the Company remains ready to negotiate with the Union towards a renewal collective agreement.

10. The proposal attached to the letter provided for, among other things, a 6.4 per cent reduction in wages.

11. Counsel for the union responded to the letter as follows:

> It has never been the Union's position that it does not wish to negotiate a renewal of the Collective Agreement with the company. The Union is not willing to negotiate the severe concessionary proposals tabled by the Company. Both the Union and the Company have continuing obligations to negotiate in good faith and make all reasonable efforts to conclude a renewal collective agreement.
>
> The Company is *(sic)* unilateral and dictatorial alteration of terms and conditions of employment from those contained in the expired Collective Agreement to those contained in the Company proposal attached to your letter of November 25, 2005 cannot be implemented nor proposed to bargaining unit employees without the Company initiation of a lockout. The lockout deadline is 12:01 a.m. December 5, 2005. The Union is not on strike and will not commence a strike at that time. The Union seeks to continue the existing Collective Agreement pending further negotiations. It is the Company that must initiate a Lockout of the bargaining unit employees in order to lawfully implement changes to the terms and conditions of employment. The Company lockout cannot commence before 12:01 a.m. Monday December 5, 2005.
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> The Company cannot lawfully bargain terms and conditions of employment directly with bargaining unit employees prior to the implementation of a strike/lockout as such would constitute a violation of section 73 of the *Labour Relations Act, 1995* ("the Act"). Accordingly, the Company cannot lawfully propose the implementation of its concessionary terms and conditions of employment to bargaining unit employees prior to its implementation of a lawful lockout no earlier than 12:01 a.m. Monday December 5, 2005. To do so is to bargain directly with bargaining unit employees contrary to section 73 of the Act. The Company's intention to "to advise the employees of this implementation on December 1, 2005" is a clear violation of section 73.
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> All members of the bargaining unit will report for work at their normal scheduled start times on Monday December 5, 2005 to work in accordance with the Collective Agreement terms and conditions. Should the Company initiate a lockout at that time it may dictate the terms and conditions of employment to employee lockout replacements. Should the Company attempt to initiate direct discussions with employees prior to its initiation of a lockout the Union will seek redress before the Ontario Labour Relations Board by an application pursuant to section 101 of the Act for unlawful lockout.

12. Counsel for the company responded as follows:

> The statutory freeze ends as of 12:01 a.m. on December 5, 2005. The employer is entitled to alter the terms and conditions of employment of the bargaining unit employees at that time. The employer has no intention at this time of locking out the employees. On the contrary, the Company wishes to continue employment for the employees in the bargaining unit on the basis of the terms of Mr. Atkinson's letter to the Union dated November 25, 2005.

> As it has maintained from the outset of these negotiations, the Company remains willing to meet to negotiate a renewal collective agreement. It is your client who has consistently refused to meet to negotiate with the Company and is therefore in breach of its duty to bargain in good faith.
>
> Please be advised that any application to the Labour Board by your client will be met with an application by our client concerning your client's breaches of the Labour Relations Act.

13. On December 1, 2005 the company provided its employees with a copy of the company's proposal which had been provided to the union on November 25, 2005. The letter covering the proposal states:

> Re: Implementation of Company Proposal for Resolution
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> Attached for information purposes only is the Company's Proposal for Resolution of a new collective agreement, which was provided to your Union on November 25, 2005. Unfortunately, at this time, the Company and Union have been unable to reach agreement on a new collective agreement.
>
> By operation of law, the current collective agreement will be void and of no force and effect after December 4, 2005. The Company will be implementing the attached Proposal commencing December 5, 2005. This means that the Company is prepared to continue your employment after December 4, 2005 on the basis of the terms and conditions of employment in the expired collective agreement, with the exception of Article 8 – Adjustment of Grievances, and as changed by the Company's attached Proposal.
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> Some of the changes contained in the Company's Proposal and implementation dates are as follows:
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> - 6.4 decrease in all wages, effective December 5, 2005
> - Introduction of deductibles and 80-20 co-payment of eligible expenses under the Drug and Hospital Care Plan and the Dental Plan, effective January 1, 2006
> - Vacation changes, effective January 1, 2006
> - Effective July 1, 2006, introduction of a Defined Contribution Pension to take the place of the current plan arrangements going forward (see Proposal for details)
>
> All other changes contained in the Proposal will be effective December 5, 2005.
>
> Thank you for your anticipated cooperation and please contact a member of your union executive or a shop steward if you have any questions.

14. On December 5, 2005 all of the workers attended for work and provided the company with a signed statement as follows:

> I, ________________, am reporting to work today under the terms and conditions of our present Collective Agreement. I do not accept the terms of

> employment that the Company has proposed. I support our Union, United Steelworkers Local 1-2693 and their position. I would ask that the Company negotiate with the Union and not directly with me. Negotiating with me and changing my terms and conditions of employment is a violation of the Ontario Labour Relations Act.

15. All of the workers have continued to work since December 5, 2005 until the date of the consultation at least. They have been paid in accordance with the company's November 25, 2005 proposal. The parties have had one additional negotiating date, the day prior to the consultation in this matter, but no collective agreement was achieved.

Arguments

16. The employer relies on section 86 of the Act, which in its view gives it the right to change terms and conditions of employment on December 5, 2005, the date at which the union can strike and the employer can lock out. Section 86 of the Act states:

> **86.** (1) Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,
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> (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
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> (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
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> (ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,
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> as the case may be; or
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> (b) until the right of the trade union to represent the employees has been terminated,
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> whichever occurs first.
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> (2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,
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> (a) the trade union has given notice under section 16, in which case subsection (1) applies; or

> (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.
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> (3) Where notice has been given under section 59 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 48 applies with necessary modifications thereto.

17. The employer argues that section 86 is clear on its face. It states that the employer must not change terms and conditions of employment "*until*" the strike/lock-out period. The word "*until*" clearly means that the employer has the right to change terms and conditions of employment once the strike/lock-out period commences. Had the legislature intended to mean that the employer could not change terms and conditions of employment until after a lock-out commences, it could have simply said so.

18. The employer contrasts the Ontario Act with the Alberta *Labour Relations Code*, R.S.A. 2000, c. L-l, where the relevant provisions state:

> **s.147(3)** If a notice to commence collective bargaining has been served pursuant to section 59(2), no employer affected by the notice shall, except
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> a) in accordance with an established custom or practice of the employer,
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> b) with the consent of the bargaining agent, or
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> c) in accordance with a collective agreement in effect with respect to the bargaining agent,
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> alter the rates of pay, a term or condition of employment or a right or privilege of any employee represented by the bargaining agent or of the bargaining agent itself until the right of the bargaining agent to represent the employees is terminated or a strike or lockout commences under Division 13. (emphasis added)

19. The employer also relies on the few cases which have commented on the issue. In *SCM (Canada) Limited*, [1967] OLRB Rep. July 372 the Board stated, in rejecting an argument that the employer violated s.51(1) (now s.73(1)) of the Act when it imposed its last offer on employees who crossed a picket line during a strike:

> 8. Since the applicant was engaged in a lawful strike at the time of the events complained of, all the time limitations set out in section 59(1)(a) had been satisfied. Accordingly, the respondent was free to alter the rates of wages or any other term or condition of employment without the consent of the trade union. Since the provisions of section 59(1)(a) expressly contemplate an employer doing what the respondent did in this case, it therefore logically follows that the interpretation placed on section 51(1) by the applicant, which the applicant has urged the Board to adopt, is not the

> correct one. While we are of the view that the prohibition imposed by section 51(1) applies during the term of operation of a collective agreement between the parties and while the provisions of section 51(1) also apply during that period when the parties are attempting to negotiate a collective agreement or the renewal of a collective agreement, however, when the bargaining process has reached the stage when the time limitations prescribed by section 51(1) (a) have elapsed, the prohibition imposed by section 51(1) ceases to apply. Once the time limitations imposed by section 51(1)(a) have elapsed, an employer may alter rates of wages or any term or condition of employment without contravening the proscription against bargaining with his employees as set out in section 51(1) of the Act.

20. Further comment on the section (then s.70) can be found in *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49 where the Board, finding against an employer who introduced new terms and conditions prior to a "no board" report being issued, stated at para 17:

> 17. Another concern is the respondent's unilateral change in the terms and conditions of employment while it was in the midst of collective negotiations with the complainant. From the outset, as evidenced by its memoranda of September 19th and 22nd, the respondent began to emphasize its "right" to alter the terms and conditions of employment after the expiration of the fourteen day period provided for in section 70. We put the word "right" in quotation marks because section 70 must be integrated with the policy and wording of section 14 and section 70. The trade union is the exclusive bargaining agent for the employees in the bargaining unit. And thus the employer cannot, as a general rule, deal directly with his employees with respect to their terms and conditions of employment. (See *Le Syndicat Catholique des Employes de Magasins de Quebec Inc. V. La Compagnie Paquet Ltee* (1959) 18 DRL (2d) 346 (SCC) ; *J. I. Case Co. V. NLRB* (1944) 321 U.S. 332.) He must respond to such issues through the officially designated bargaining agent. When an employer, while negotiating with a trade union, implements new conditions of employment that have not even been first proposed to the trade union, the inference logically arises that the tactic is designed to undermine the status of the trade union – amounting to a suggestion that beneficial terms and conditions of employment do not require the presence of the bargaining agent. (See *NLRB v. Reed & Prince Mfg. Co.* 205 F. 2d 131 (1st Cir.); Cert denied (1953) 346, U.S. 887; *NLRB v. Katz* (1962), 369 U.S. 736.) Professor Cox (*supra*, at 1423) commented on the problem in the following manner:
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> > (2) Unilateral action yields to much the same analysis. When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great, or possibly greater than, those the union can secure. Unilateral changes made while the employees' representative is seeking to bargain also interfere with the normal course of negotiations by weakening the union's bargaining position. Consequently, proof that an employer changed wage rates or other terms of employment in the midst of contract negotiations ordinarily gives rise to the inference that he had no intention of coming to an agreement; the factual

> inference can be negated by showing that there is a need for immediate action or by proving that the negotiations had reached an impasse.
>
> In other words, if section 70 was read and applied in a literal fashion, an employer could use the freedom thus found to avoid his statutory duty to recognize a trade union and bargain in good faith. Therefore, it is our opinion that section 70 is designed to provide the employer with freedom to alter the terms and conditions of employment when negotiations have reached an impasse (although even then, while possessing a somewhat different content, the bargaining duty applies (see *New Method Laundry & Dry Cleaners* (1957) 57 CLLC ¶18,059) or where there is a *bona fide* business reason for such immediate action. (See *NLRB v. Reed & Prince Mfg. Co., supra.*) In the facts at hand, the parties were nowhere near the kind of impasse that would permit the respondent to rely upon section 50(2) then [70(2)]. It could be argued that the trade union's leaflet of September 25, 1975 wherein it invited the respondent to alter the terms of employment estoppes it from now contesting such action but we find, as a result of its memoranda of September 19th and 22nd, that the respondent intended to engage in such actions well before the trade union responded as it did on September 25, 1975. Moreover, the respondent called no witnesses to establish that it detrimentally relied on the September 25, 1975 leaflet.

21. The employer also relies on the Supreme Court of Canada decision in *Paccar of Canada Ltd.* [1989] 2 S.C.R. 983, (1989) 62 D.L.R. (4th) 437. Because of the importance of the case it is useful to set out the facts in some detail. On January 4, 1983 the company provided written notice to the union, the CAIMAW, that it was terminating the collective agreement between the parties and commencing negotiations for a new agreement. Over the next six months, the parties negotiated without success, and on June 29, 1983 the company wrote CAIMAW and advised that, in accordance with Article 21.03 of the collective agreement, they were giving notice to discontinue negotiations and terminating the collective agreement effective July 4, 1983. The company further set out the terms and conditions of employment that it would put into effect on July 4, 1983.

22. In response, CAIMAW applied to the British Columbia Labour Relations Board (the "Board") alleging several violations of the British Columbia *Labour Code*, R.S.B.C. 1979, c. 212, (the "Code") and requesting a determination as to whether a collective agreement was in full force and effect. A three-member panel of the Board decided against the union in holding that the company, in its letter on June 29, 1983, had complied with all the provisions of article 21 and successfully terminated the collective agreement with the result that the terms were no longer in full force.

23. The Board further held that an employer could unilaterally give notice to alter the terms and conditions of employment as the *Code* was silent on providing protection against such employer-initiated alterations in the absence of a collective agreement. Nevertheless, an employer could not by-pass the union and deal directly with employees, as it was restricted by the duty to bargain in good faith.

24. A five-member panel of the Board then re-heard the application and upheld the original Board decision finding that there were no statutory freeze provisions under the *Code* covering the period after the expiry of a collective agreement. Therefore, when a collective

agreement expires, an employer can make unilateral changes to the terms and conditions of employment subject to their obligation to continue to bargain in good faith with the trade union and make every reasonable effort to conclude a collective agreement.

25. On judicial review, an application quashing the decision of the review panel of the Labour Relations Board was granted and subsequently upheld on appeal by the British Columbia Court of Appeal, which determined that no section of the *Code* provided for, or implied that, an employer has the authority to make such unilateral alterations. According to the Court of Appeal, the *Code* as a whole seeks the stability which results from agreement, and the Board's decision could ultimately create instability.

26. The company then appealed to the Supreme Court of Canada. The issue on appeal was whether the decision of the respondent Labour Relations Board of British Columbia permitting an employer, after the termination of a collective agreement, to unilaterally alter terms and conditions of employment was patently unreasonable and subject to review by the Court.

27. After reviewing the history of the case, the Supreme Court ultimately decided the issue in the Board's favour. According to the Court, while the *Code* does not expressly provide the employer with the power to change the terms of which it makes employment available, it was not unreasonable for the Board to find that the power existed.

28. Six justices heard the case. Two held that the Board's decision was correct, two found it was reasonable and two decided that it was patently unreasonable.

29. LaForest J., in finding that the Board's decision was reasonable stated at p. 451:

> *However, denying to the employer the power within the context of a collective bargaining relationship to, subject to its duty to bargain in good faith, change the terms on which it will make employment available denies almost all effect to the termination clause agreed to by the parties.* Instead of terminating the agreement in any real sense, it simply would signal the commencement of a new bargaining session, coupled with the threat of strikes or lockouts. The position taken by Judson J. in *C.P.R. Co. v. Zambri* 1962), 34 D.L.R. (2d) 654 at p. 666 [1962] S.C.R. 609, 62 C.L.L.C. 450, that "When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship" seems more satisfying. The relationship continues, of course, to be subject to the requirements contained in the appropriate statutory scheme.
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> While it is true that the Act does not expressly provide that the employer has the power contended for, it was not unreasonable for the board to find that the power existed. Professor Weiler, the first Chairman of the B.C. Labour Relations Board and one of the drafters of the *Code*, discusses the issue of unilateral alteration as follows:
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> > Suppose the employer cannot get an agreement from the union to change these requirements in a new contract. In that event, management is entitled to act unilaterally. It can simply post an announcement to its employees that it is reducing the price it will pay for labour and the amount of labour that it is going to use. That is what

> it means for management to exercise the rights of property and of capital; to be able to propose the terms upon which it will purchase labour for its operations.
>
> What rights and resources do the employees and their union have in response? In essence, they have only the collective right to refuse to work on those terms, to withdraw their labour rather than to accept their employer's officer. That is what a strike consists of.

It was argued that the *Labour Code* as a whole was designed to balance the power of the employer and the union by balancing the right to strike against the right to lockout. On this point, Professor Weiler writes as follows (p.67):

> A lockout is not the employer equivalent of a strike. As I have shown, the reciprocal employer lever is really the management prerogative to maintain or to change the terms and conditions which the employer will pay its employees who want to work in its operations. (A lockout is usually the instrument of an employer association, an employer "union", which wants to defend itself against selective trade union strikes of its members.)
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> Two further considerations support the view that it was not unreasonable to find that the employer has the power to alter the terms and conditions on which he will make employment available. First, the experience of other jurisdictions shows that allowing the employer this power will not have a catastrophic effect or upset the delicate balance of power between the union and the employer. Put another way, the experience of other jurisdictions does not show that the power of unilateral alteration introduces any unfairness into the bargaining relationship. Nothing was advanced to support the view that a denial of this power is an essential element of an effective labour relations regime. Secondly, the power to change the terms of employment once an agreement has expired and the parties have been unable to agree can be inferred from the existence of provisions in the *Code* which limit the circumstances in which unilateral changes can be made.
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> No Canadian labour relations legislation grants an employer explicit power to unilaterally change terms and conditions of employment. Rather, the different jurisdictions have either declared that it shall be an unfair labour practice to effect such changes without first bargaining collectively in respect of those changes or unless a strike or lockout has occurred (see *Labour Relations Act*, R.S.M. 1987, c. L-10, s.10(4); the *Trade Union Act*, R.S.S. 1978, c. T-17, S. 11(1)(m)) or have placed limits on the circumstances upon which such changes can be made. Thus, in the majority of jurisdictions an employer is prohibited from effecting changes until a strike or lockout has or could occur; see *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 145; *Labour Code*, R.S.Q. 1977, c. C-27, s. 59; *Canada Labour Code*, R.S.C., 1985, c. L-2, ss. 50, 89; or until the parties have bargaining collectively and failed to reach an agreement and a conciliator or mediator has either been unable to resolve the dispute or has not been appointed; see *Labour Relations Act*, R.S.O. 1980, c. 228, s. 79; *Industrial Relations Act*,

> R.S.N.B. 1973, c. I-4, s. 35(2); *Labour Act*, R.S.P.E.I. 1974, c. L-1, s. 23; *Labour Relations Act*, S.N. 1977, c. 64, s. 74; *Trade Union Act*, S.N.S. 1972, c. 19, s. 33. While none of these statutes exactly parallels the *British Columbia Labour Code*, much can be drawn from the fact that no jurisdiction has found it necessary to expressly permit an employer to unilaterally alter terms of employment, and implicitly all other jurisdictions allow it, albeit with some limitations: see also *I.A.M.A.W. v. Air Canada*, unreported decision of C.L.R.B., released January 18, 1988; *Canada Safeway Ltd. v. R.W.D.S.U., Locals 454 & 480* (1985), 11 Can. L.R.B.R. (N.S.) 68.

30. The union's argument is succinctly set out in counsel's letter dated November 30, 2005. The union argues that the employer may not impose terms and conditions of employment until after it has locked out employees – which the employer has specifically decided not to do. Any implementation of terms and conditions of employment prior to a lock-out constitutes direct bargaining with employees in violation of s.73(1) of the Act.

31. The union argues that the words in s. 86 are to be read in conjunction with and subject to the prohibition against bargaining directly with bargaining unit employees. To impose terms and conditions of employment prior to a lock-out is to bargain directly with bargaining unit employees. In the union's submissions, once the employees are locked out and go to work after the lock-out takes place they are no longer employees in the bargaining unit and the employer's right to implement new terms and conditions with respect to these employees and other employees who may be hired commences.

32. The union relies on the Supreme Court of Canada decision *McGavin Toastmaster* (1975) 54 D.L.R. (3d) 1 S.C.C. where the Court stated:

> I am of the same opinion as the majority of the British Columbia Court of Appeal, affirming the decision of the trial Judge, that the plaintiffs should succeed, but I come to this conclusion on different grounds. I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. The majority of this Court, speaking through Judson, J., in *Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee* (1959), 18 D.L.R. (2d) 346 at pp. 353-4, [1959] S.C.R. 206 at p. 212, said this in a situation where a union was certified for collective bargaining under Quebec labour relations legislation:
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>> There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations ....
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> ...

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

33. The union also relies on *Reliable Bookbinders Limited* [1993] O.L.R.D. No. 2928 July 27, 1993 where the Board stated:

> 30. ...we start from the proposition that the Ontario Labour Relations Act is premised on a scheme of labour relations based on the use of countervailing economic sanctions to reach mutual agreement on the terms and conditions under which employees work. With this in mind, it must be acknowledged that allowing one party to unilaterally dictate those terms and conditions of employment does not fit into such a framework with apparent ease. If an employer can simply implement its last offer, rather than using a lockout or the bargaining power that the possibility of a lockout provides to reach a compromise on working conditions, the effect is less than entirely compatible with a theory of collective bargaining in which negotiations backed by economic weapons are designed to provide a vehicle for organized employees to participate in establishing those terms.

34. For the proposition that employees who "cross the picket line" after they are locked out are not "employees in the bargaining unit" the Union relies on *ResCare Premier Canada Inc. (c.o.b. Anagram Premier)*, [2003] OLRB Rep. November/December 1077 where the Board held:

> It is the Board's view that the decision as to whether a trade union ought to continue to represent the members of the bargaining unit ought to be made *only* by those employees of the employer that the trade union represents. The terms and conditions of the employment of the replacement workers are not negotiated by the trade union. The decision as to whether the trade union should continue to hold their exclusive rights may not be made by persons, such as replacement workers, whom the trade union does not represent.

35. Finally, the union relies on the dissents in *Paccar, supra* which is discussed by the Board in *Reliable Bookbinders, supra*. There Wilson J. states at p. 443 of the D.L.R.:

> It seems to me that the key to the problem lies in the fundamental obligation of employer and union to bargain in good faith towards a new collective agreement once the earlier agreement has been properly terminated. I do not see how an employer can be bargaining in good faith towards a new collective agreement while at the same time unilaterally imposing detrimental terms upon the employees which he knows have already been rejected. (By detrimental terms I mean terms less beneficial to the employees than the terms in the earlier agreement.) I agree with the British Columbia Court of Appeal ((1986), 7 B.C.L.R. (2d) 80) that where

the employer continues to employ the employees and the employees continue to work for the employer after the earlier agreement has been terminated, the terms and conditions of employment should be deemed to be the same terms and conditions as those in the earlier agreement until such time as new terms result from the process of bargaining in good faith. This must be so if good faith bargaining between employer and union is to have any opportunity to work. If, however, the parties cannot agree on new terms then, subject to the further requirements of the Code, the parties have their rights of lock-out and strike. But it seems to me that to interpret the Code (where the Code is silent on the subject) as permitting the employer to unilaterally impose new terms on the employees in the interval is to allow the employer to effectively bring the good faith bargaining period to an end. It is to say that the employer may decide when an impasse has been reached, when the time has come that further bargaining is useless because he, the employer, is not prepared to move from his position, and that, having so decided, he may then proceed unilaterally to impose new terms even if those terms were the very ones which brought about the impasse. Compromise, which is the accepted means of ensuring the ongoing nature of the good faith bargaining process, is thus declared by the employer to be at an end and the employees are confronted with the option of living with the employer's new terms until the union is in a strike position or leaving their employ and trying to find work elsewhere.

Why, one might ask, should an employer be able to destroy in this way the freedom and equality of bargaining power both parties must have at the bargaining table? Why should he have this new power? It seems to me obvious that to permit the employer to decide when an impasse in the collective bargaining process has been reached and then give him the power to impose new terms unilaterally on his employees will do nothing to promote the collective bargaining process which is the legislatively accredited means of achieving collective agreements and industrial peace. As the British Columbia Court of Appeal pointed out at p. 85:

> The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action.

Must we conclude that in the absence of a specific provision in the Code the employer is free to do anything which he is not specifically prohibited from doing? This seems to be the underlying premise of the appellant's position. Nothing in the Code, they say, prevents the employer from unilaterally imposing new terms. Or do we in filling the legislative vacuum take guidance from the legislative scheme? It seems to me that the latter must be the proper course.

I cannot believe that the legislature intended in the circumstances before us to return the parties to pre-collective bargaining standards, particularly if there is another interpretation of the Code which does not give one of the negotiating parties the power to alter dramatically the balance of bargaining power between them in his own favour and which also has the very significant advantage of endorsing rather than undermining the collective bargaining process. That interpretation is, of course, to permit the same terms and conditions which were the product of the earlier bargaining process to apply in the event of an impasse until such time as the parties are in a strike/lock-out position.

36. In *Paccar, supra*, L'Hereux-Dubé J. also dissented and in doing so discussed the purposes of the regulation of economic sanctions at p. 464:

> While they may be different in accessory respects, all economic sanctions used in collective bargaining share three fundamental characteristics: they only come into play after concerted attempts at settlement; they hurt both parties economically; and they presuppose the existence of countervailing measures.
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> . . .
>
> 2 - Discussion
>
> The unilateral imposition of the terms of employment as recognized by the Board in the present instance shares none of these three characteristics. First, the policy stated by the Board in the CAIMAW/IBEW re-hearing provides for no ban on the unilateral imposition of terms of employment in the early stages of negotiation. Such unilateral sanction may theoretically, on the basis of that policy, take place at any time following the termination of the previous collective agreement. This result is most unusual when compared to the law in other jurisdictions. In the United States, an exception to the general prohibition against the imposition of the terms of employment was created in the case of an impasse. This exception is itself subject to restrictions with respect to the extent, context and manner of the changes brought about by the employer (see the discussion by T. H. Murphy, "Impasse and the Duty to Bargain in Good Faith", (1977) 39 U. Pitt. L. Rev. 1, at pp. 24-34). Moreover, as noted in the reasons of my colleague La Forest J., the majority of Canadian jurisdictions prohibit unilateral changes either until the right to strike or lock out is acquired or until negotiation, conciliation and mediation have all failed to produce an agreement. Consequently, there is a near unanimous recognition of the need to freeze working conditions until either an impasse is reached or the right to strike or lock out arises -- a situation which typically takes a number of months after termination. However, on the basis of the policy formulated by the Board, British Columbia would be the only jurisdiction in North America where the imposition of terms can occur before such time.
>
> Second, the employer is not detrimentally affected if it decides to reduce the salaries and cut other employment benefits. The unilateral imposition of terms may thus actually be profitable to the employer since it allows continued production at lower costs.
>
> Third, since the imposition of terms could conceivably take place before the right to strike arises under the Labour Code, no sanction is available to the union to countervail the unilateral setting of terms. The union cannot impose on the employer the wages, hours and other benefits it seeks to obtain. It has no choice but to live with the new conditions until the right to strike springs into existence, and even then it may have no option.
>
> More importantly, unlike the strike and lock-out, the unilateral imposition of the terms of employment does not necessarily pressure both parties into agreeing upon a settlement. This sanction opens the door to a number of abuses of the process of collective negotiation. Altering terms may have detrimental repercussions on the process of bargaining, such as discrediting the union's authority to negotiate an agreement or unduly forcing the union's hand in the decision to call for a strike.

Decision

37. In order to succeed in this application, the applicant must demonstrate that the responding party violated one or more of the sections which are listed in paragraph 1 of this decision. I will consider each of these sections individually.

S.86

38. Given that the employer's case rests in large part on a plain reading of s. 86 of the Act, it is useful to start with an analysis of that section. On its face s. 86 prohibits an employer from altering terms and conditions of employment until after a party has given notice to bargain, the collective agreement has expired and the parties are in a strike/lock-out position. In my view it is clear that once the parties are in a strike/lock out position, s. 86 does not prevent an employer from altering terms and conditions of employment without the union's consent.

39. The union generally argues that the Board should, in effect, find a sort of rule, that being that terms and conditions cannot be changed until a lock-out. However, there is no support for that rule in s.86. Had the Legislature intended such a rule it could have, as did the Alberta Legislature, easily drafted s.86 in such a way to accomplish that result. In fact it appears that the Legislature took another approach.

40. This view of the law is supported by the dissent in the *Paccar* decision which is relied on by the trade union. There L'Hereux-Dubé, J. commented on the law in place in jurisdictions other than British Columbia as follows:

> Moreover, as noted in the reasons of my colleague La Forest J., the majority of Canadian jurisdictions prohibit unilateral changes either until the right to strike or lockout is acquired or until negotiation, conciliation and mediation have all failed to produce an agreement. Consequently, there is a near unanimous recognition of the need to freeze working conditions until either an impasse is reached or the right to strike or lockout arises – a situation which typically takes a number of months after termination.

These comments strongly suggest, despite her analysis of the labour relations consequences of the employer's unilateral implementation of terms and conditions of employment, that Madame Justice L'Hereux-Dube recognized the law in other provinces (including Ontario) was that once the right to strike/lock-out arises, the freeze no longer applies.

41. In this case, the employer altered terms and conditions of employment only after the strike/lock-out period had commenced. I conclude, therefore, that the employer has not violated s. 86.

S.73

42. The Board recognizes that s.86 does not stand alone. Just because s.86 does not prohibit employer action does not mean it is permitted. Conduct may be prohibited by another section of the Act. The Union's argument in this case is that the prohibition contained in s. 73(1) against bargaining directly with employees is not extinguished when the periods established by

s.86 are reached or even in the event of a strike or lock-out and is potentially just such a prohibition. S.73 states:

> **73.** (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

43. The employer argues that the decision in *Paccar* is binding on the Board with respect to s.73(1) and therefore the Board must find in the employer's favour. I disagree. First, the decision is not technically binding as it involved the *British Columbia Act*, not the *Ontario Act* and the provisions under review are quite different. Secondly, and more importantly, according to a majority of justices, the Court was not determining whether the British Columbia Board's interpretation was correct, only whether its interpretation was patently unreasonable.

44. Critically, in finding that the British Columbia Board's determination was not patently unreasonable LaForest J. specifically stated that the "result reached by the [B.C. Board] is as reasonable as the alternative". In short, the Board can take little from the fact that two justices of the Court held that the Board's decision was correct, two justices held that the decision was reasonable (while declining to decide whether it was correct), and two justices found the British Columbia Board's decision patently unreasonable.

45. Having said that, I find little statutory support for the union's position.

46. Under the union's theory, the employer cannot change the terms and conditions of "employees in the bargaining unit" until there is a strike or lock-out. To do otherwise would be to bargain directly with employees in the bargaining unit contrary to s.73(1). The next aspect of the union's argument is novel. It asserts that once a strike/lock out occurs, employees who continue to work (whether they are employees who cross the picket line or new replacement workers) are not or are no longer "employees in the bargaining unit" so that the employer is free to deal with them as it sees fit.

47. The first problem with the union's interpretation becomes apparent when s. 73 is analysed in the context of s.86. As discussed above, if that had been the Legislature's intention with respect to s.73, it would have been easy to draft s. 86 in such a way to reflect that intention.

48. Indeed the language of s. 86 suggests a different intention. The fact that s. 86 uses the phrase "alter rates of pay" suggests that, once the strike/lock out period has commenced, the employer's unilateral implementation of new terms and conditions of employment is not, under those circumstances, the same as "bargaining". The use of the word "alter" suggests a distinction between "bargaining" and the unilateral imposition of new terms and conditions of employment, the first of which is always prohibited, while altering terms of conditions is prohibited while the collective agreement is in operation and during the statutory "freeze", but is permitted once the parties are in a strike/lock-out position.

49. Moreover, while s. 86 does not use the term "employees in the bargaining unit" that is clearly whose terms and conditions are frozen. Were it otherwise, the requirement that the employer obtain the trade union's consent before altering terms and conditions would not make sense.

50. If the union's interpretation is correct the term of the collective agreement, and the termination of the collective agreement would have no significance or even meaning. As LaForest, J. said, the end of the term would simply "signal the commencement of a new bargaining session, coupled with the threats of strikes or lockouts". It is difficult to believe, given the entire statutory context, that is what the Legislature intended.

51. This interpretation is consistent with the case law in both Ontario (which is discussed above) and other jurisdictions. In *Canada Safeway Ltd.* 11 CLRBR (NS) 68 (1985) the Saskatchewan Labour Board had before it facts and issues which were virtually identical to those before the Board in this case (albeit under a somewhat different statutory regime). There, in finding in favour of the employer on this issue, the Board discussed the jurisprudence. It noted that the American law was that the employer can make unilateral changes with respect to mandatory subjects of collective bargaining only after the parties are at a bargaining impasse. It then discussed the British Columbia Board's decision in *British Columbia Hydro & Power Authority*, BCLRB No. 284/85 (October), reviewing as follows:

> The *British Columbia Hydro & Power Authority* case also dealt specifically with whether an employer in that province could make unilateral alterations to terms and conditions of employment after the expiry of a collective agreement in view of s. 46(a) of the B.C. *Labour Code*, which provides that a certified trade union has exclusive authority to bargain collectively for the bargaining unit and to bind it by a collective agreement until the certification is cancelled. Having reviewed the relevant authorities, including its own previous decisions (most notably *Dominion Directory Co. Ltd.*, [1975] 2 Canadian LRBR 345), the Board concluded at p. 31:
>
> > Having given this matter serious consideration, we have concluded that Section 46(1) of the Labour Code does not prevent an employer from making unilateral alterations to terms and conditions of employment after the expiry of the collective agreement and after he has sought to negotiate those alterations with the union and the union has rejected them. We agree with the conclusion of the panels in *Dominion Directory Company Limited, supra*, and with the conclusions reflected in the American jurisprudence that an employer has the authority to make unilateral changes in these circumstances, subject of course to his duty to bargain in good faith pursuant to Sections 6 and 63 of the Labour Code.
> >
> > When an employer makes unilateral alterations to terms and conditions of employment after a failure to bargain them to agreement through the union, he is not bypassing the union in doing so. As the reconsideration panel notes in *Dominion Directory Company, supra*, "in these circumstances, the employer has attempted to use the union as the 'avenue' through which to implement" the changes. Further, a unilateral implementation of change is different from a negotiated agreement with an individual employee. This distinction is clearly

> reflected in the Board's jurisprudence under the Labour Code – contrast the Board's decision in *MacMillan Bloedel Industries Limited, Harmac Division*, BCLRB No. 46/74, [1974] 1 Can LRBR 313, and the decisions of the panels in *Dominion Director Company Limited, supra*. One involves unilateral action; the other authority to conclude such an agreement.

52. The second problem with the union's theory is that it must accommodate the fact that, as it recognizes, at some point the employer is (in the absence of other unfair labour practices) permitted to unilaterally, set new terms and conditions of employment and that this conduct is not inherently a violation of s.73. The union argues that the point at which this may be done is after a strike/lock-out commences. It argues that this is not prohibited by s.73 because at that point employees who "cross the picket line" are no longer employees in the bargaining unit. However, in my view, that interpretation of the term "employees in the bargaining unit" is difficult to reconcile with all of the provisions of the Act. I take no issue with the fact that new employees hired as replacement workers are not "employees in the bargaining unit" (see *ResCare Premier Canada, supra*). But the issue of whether employees represented by the union who cross the picket line are no longer "employees in the bargaining unit" is much more thorny.

53. In this regard, the Saskatchewan Board's decision in *Forseth (Re), supra*, is distinguishable. That case involved the interpretation of a provision which restricted the right to vote to employees "involved in the strike" which is not present in the Ontario Act.

54. The Board's decision in *ResCare Premier Canada, supra*, does not address the issue either. However, the case relied on by the Board in the *ResCare* case, *Bird Machine Co.* (1990), 10 CLRBR (2d) 251 does appear to draw a distinction between union replacement workers and non union replacement workers which I accept:

> *When a strike is declared and members of the bargaining unit walk out, the appropriate functional unit "walks out" with them. The employer then has the right to employ management personnel and replacement workers for the purpose of doing the work of the bargaining unit. However, those non-union replacement workers do not become members of the bargaining unit any more than management personnel who are also replacing striking employees.*
>
> [emphasis in the original]

55. This is a distinction that makes sense under the Ontario Act. If union employees who cross the picket line are not employees in the bargaining unit as the union argues, then they would not be entitled to vote whether to strike or to ratify a collective agreement. That is not the Board's understanding of the practice in Ontario. The union's suggestion that such employees momentarily return to the bargaining unit in order to cast their ratification ballot and then exit the bargaining unit if a collective agreement is not ratified and the employees return to work is wholly unsatisfying. Moreover, if union employees who cross the picket line are not employees in the bargaining unit, the employer would be permitted to "bargain" directly with such employees, an outcome which makes little labour relations sense.

56. I am therefore satisfied that union employees who cross the picket line during a strike or lock-out remain employees in the bargaining unit and that the union's argument on this point must be rejected.

57. Finally, it is also not at all clear that labour relations policy considerations actually favour the union's interpretation of s.73(1). In my view the dissents in *Paccar* must be understood in the specific context of that case. In particular, the fact that the union had no recourse after the employer implemented the new terms and conditions of employment is paramount. It is indeed difficult to understand how collective bargaining can meaningfully occur in that circumstance. However, that is not the case here. At Neenah Paper the union has the ability to respond. If it and the employees are unhappy with the new terms and conditions of employment they can simply go on a full-blown strike or engage in other activity to restrict production.

58. In Ontario, the Act is premised on the fact that the parties may engage in economic warfare once the strike/ lock out conditions have been met. Such economic warfare can, so long as it does not otherwise constitute a violation of the Act, take a variety of forms. Unions can legally engage in strikes. They also may engage in other activity which does not amount to a full blown work stoppage, in order to put pressure on the employer. Included in these tactics are rotating strikes, overtime bans, "work to rule" activities etc. The employer has a similar broad range of economic weapons at its disposal (all of which must be exercised subject to the Act's unfair labour practice provisions). It can lock out. It can hire replacement workers to replace locked out or striking workers. I see no reason why, subject to the other provisions of the Act, a unilateral implementation of new terms and conditions (which have been offered to the union in collective bargaining) cannot form part of the employer arsenal. As has already been stated: if the union and the employees do not wish to operate under the new terms and conditions they do not have to. In short, on balance it appears that the statute contemplates exactly what occurred in this case. Had the interpretation advanced by the union been intended, the Legislature could have simply said so.

59. I find something quite artificial about the union's approach. Under its theory, had the employer called all of the employees together on December 5 and said "we are now locking you out and here are the conditions under which you can keep your job", the employer would not be in violation. That seems to me a distinction which does not make labour relations sense.

60. I am therefore satisfied that there has been no breach of s.73(1).

S.17 Duty to Bargain in Good faith

61. The union did not specifically allege a breach of s. 17 in its application. However, since the *Paccar* decision, which was a case partially about the obligation to bargain in good faith, was heavily relied on by the union, it is appropriate to directly consider this aspect as well.

62. I start by noting that the union does not allege that the employer has bargained in bad faith in the traditional sense. That is, on the facts there can be no doubt that the employer met and sought to meet with the union for the purpose of collective bargaining. There is no allegation that it did not wish to conclude a collective agreement, albeit one that was satisfactory to it.

63. It is also notable that it is not alleged that the employer did any of the activities which form the basis of this complaint behind the union's back. It first gave the proposals it intended to implement to the union before giving them to the employees. It told the union what it intended to do if those proposals were not accepted by the union. Employees were advised to seek the union's assistance if they had any questions about the new terms and conditions.

64. The Board discussed the employer's "right" to implement new terms and conditions in the context of its obligation to bargain in good faith in *DeVilbiss, supra*. In that case the Board held that the employer's "right " to impose terms and conditions of employment arises after the time periods established by s.86 have run their course and the parties are at an impasse, or when there is a *bona fide* business reason for such immediate action. I accept that proposition. It would be an unfair labour practice for an employer to implement new terms and conditions while the parties are in active bargaining without a good business reason for doing so and without notifying the union first.

65. In my view, while an impasse would certainly exist if a strike or lock-out has actually commenced, that is not the only point at which an impasse can occur. In this case I conclude the parties were at an impasse. I come to that conclusion because, while the employer was pressing the union to engage in negotiations, the Union was refusing until agreements with other forestry companies had been reached. By December 5, bargaining was not occurring and had not been for some time. While I do not conclude that the union was not bargaining in good faith, particularly in view of the party's past pattern bargaining, it is clear on the agreed facts that the parties' negotiations had come to a standstill.

66. I also note that there is no argument that the employer's actions were intended to or did in fact undermine the union's bargaining authority as the exclusive representative of the employer in the bargaining unit. In this regard, it is important that the employer's new terms and conditions are concessions, not improvements. This is not a case where the employer is, in effect, advising employees that they would be better off without a union. It is also critical to keep in mind that an employer will be prohibited from implementing these terms and conditions when, for example, the purpose of doing so is to undermine the union or in order to avoid bargaining. In many cases where an employer implements unilaterally terms and conditions of employment the Board may well conclude that the employer is avoiding the union's bargaining authority. However, given the facts before the Board, there is also no suggestion of that here.

67. The reasoning set above also deals with the union's arguments (to the extent there are any) that the employer violated s.70, 72, 76 and 83 of the Act. The facts do not disclose a breach of those sections. On these facts the employer did not interfere with the administration of a trade union(s.70), did not punish or threaten to punish employees for exercising rights under the Act (s.72) and did not in any way intimidate or coerce employees to refrain from exercising rights under the Act. As for s.83, since the parties were in a strike/lock-out position, there can be no violation.

68. For all of these reasons the application is dismissed.

3060-05-R; 3061-05-U; 3065-05-R; 3232-05-R; 3303-05-R; 3369-05-R Labourers' International Union of North America, Local 506, Applicant v. **Northland Properties Corporation, Vandalay Contracting Inc.**, Responding Parties; Central Ontario Building Trades Council, Labourers' International Union of North America, Local 506, Carpenters Union, Central Ontario Regional Council, UBCJA, Craig Cyr and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Applicants v. Northland Properties Corporation, Vandalay Contracting Inc., Responding Parties; Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America, Applicant v. Northland Properties Corporation and/or Vandalay Contracting Inc., Responding Parties; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Applicant v. Northland Properties Corporation and/or Vandalay Contracting Inc., Responding Parties; Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America, Applicant v. Northland Properties Corporation and/or Vandalay Contracting Inc., Responding Parties; Central Ontario Building Trades Council, Labourers' International Union of North America, Local 506, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Applicants v. Northland Properties Corporation and/or Vandalay Contracting Inc., Responding Parties

Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

BEFORE: *Mary Ellen Cummings,* Alternate Chair.

APPEARANCES: *Elizabeth Mitchell, Elio Toppon* and *Carlo Di Blasio* for the Labourers' International Union of North America, Local 506; *Elizabeth Mitchell* and *Joe Ferro* for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46; *Steven Bosnick* and *Chris Smith* for the Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America; *John-Paul Alexandrowicz, Bonnie Roy-Choudhury and Clayton Davidson* for Northland Properties Corporation and Vandalay Contracting Inc.; *Reid Rusonik* for *Clayton Davidson.*

DECISION OF THE BOARD; March 21, 2006

1. These files consist of three applications for certification, an unfair labour practice complaint and two applications seeking a determination that the responding parties are a single employer within the meaning of section 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act") and/or for a determination that there has been a sale of business from one responding party to the other. As a result of the unfair labour practices which the applicants assert occurred, they seek remedial certification, pursuant to section 11 of the Act.

2. At the start of the hearing, the responding parties did not have an advisor present. Counsel for the responding parties explained that Clayton Davidson is the only corporate "presence" for the responding parties in Ontario and has an intimate knowledge of the matters in issue. However, as a result of an altercation which occurred between Clayton Davidson and Craig Cyr, which is related to the issues before me, Mr. Davidson made an Undertaking Given to a Peace Officer or Officer in Charge ("the Undertaking") in which Mr. Davidson agreed to abstain from communicating with Mr. Cyr or "…from going to Anyplace Craig Cyr is known to be". Counsel for the responding parties explained that since it did not know if Mr. Cyr would be attending at the hearing, it did not bring Mr. Davidson. The matter was resolved in the manner set out in the following brief decision which I issued in writing on March 16, 2006, after hearing from the parties:

> Counsel for Craig Cyr had represented that Mr. Cyr is not on the Board's premises and that to her knowledge, Mr. Cyr is not in the City. On the basis of that representation to the Board, I indicated to counsel that there appeared to be no impediment to Mr. Clayton Davidson attending today's proceedings as an advisor to the responding parties.

3. Mr. Davidson then attended the hearing, as advisor to the responding parties.

4. The responding parties sought to have the whole proceeding adjourned pending the hearing of the criminal charges that have been brought against Mr. Davidson. All the parties essentially conceded that the events that gave rise to the criminal charges are implicated in the pleadings. Essentially, the three unions contend that the physical altercation between Mr. Davidson, the site superintendent, and Mr. Cyr, an employee, who it is alleged was known to be a union supporter, was the culminating incident in a pattern of intimidation and interference in the unions' and employees' lawful right to organize. The responding parties assert that Mr. Cyr was the aggressor in the incident and that Mr. Davidson's role was limited to preventing an escalation in the violence. However one views what actually happened, it is not contested that the Board will have to make some factual determinations about what happened, even though the Board's focus will not be on determining whether an assault, as that term is understood in the criminal law, took place. The Board's focus will be on determining what the employees who saw the altercation perceived and how that perception, in concert with the other findings the Board makes about other events that took place, affected the employees' ability to exercise their rights under the Act.

5. A date has not been set for the criminal trial. Mr. Davidson's criminal counsel predicts that they will be lucky to get a trial date in the late fall, but their willingness to accept trial dates in late December may be an advantage. Counsel for Mr. Davidson submitted that it is not in the best interests of Mr. Davidson that the hearings proceed. First, Mr. Davidson would

likely be required to "tell his story" at the Board or risk censure by his employer, a dilemma that an accused in a criminal trial should not face. In counsel's view, Mr. Davidson should not risk telling any part of the story before the criminal trial. Further, he would be required to tell his story in the presence of his accuser, Mr. Cyr, potentially tipping the Crown off to his defence and the potential witnesses he might call. Finally, counsel argued that merely having Mr. Cyr and Mr. Davidson in the same room makes Mr. Davidson vulnerable to further allegations of wrongdoing. The best defence available to Mr. Davidson is to stay away from Mr. Cyr and from any discussion of the events that are the subject of the criminal proceeding.

6. The arguments made by the parties are summarized in the ruling which follows. Essentially, the responding parties asserted that the concerns raised by counsel to Mr. Davidson impact on their ability to have an advisor of their choosing, the person most knowledgeable about these events, but who is conflicted and understandably distracted by personal concerns about his liberty. The best way to remedy that problem, the responding parties assert, is to delay this matter until the criminal charges are resolved.

7. The unions wanted the Board to hear the unfair labour practice complaint, along with the sale of business/related employer application.

8. After hearing the parties' submissions, I made the following ruling:

> I am not prepared to adjourn these proceedings pending a determination of the criminal charges. Further I direct that the Board first hear and determine the unfair labour practice complaint and its impact on the applications for certification before hearing and determining the related employer/sale of business applications.
>
> First, the applicants do not consent to the adjournment of their applications and that has always been treated by the Board as a significant factor. Second, serious allegations of unfair labour practices have been made, in the context of an organizing campaign, a breed of complaint to which the Board gives priority because of the potential for damage to the trade union which cannot be remedied by money. Third, the personal concerns of Mr. Davidson do not attract the same level of concern as do the interests of parties. With all due respect, Mr. Davidson is simply a witness and advisor and his interests are not as high as those of a party. Fourth, the concerns that the responding parties have raised about being able to have as an advisor someone who is not conflicted between his interests to himself and his interests to the employer is not a concern that the Board can easily remedy. Parties often have to cope with persons with divided loyalties or whose loyalties have shifted. I also do not share the responding parties' confidence that a resolution of the criminal charges will necessarily make a difference to that conflict. In any event, the potentially divided interests of Mr. Davidson and the employer is not a reason to adjourn these proceedings. There are a number of options to address the concerns about Mr. Davidson as advisor:
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> 1. The responding parties can choose another advisor.
>
> 2. Application can be made to the court to have an early court date or to amend the Undertaking to permit Mr. Cyr and Mr. Davidson to attend Board hearings.

> 3. Mr. Cyr could agree to absent himself from the proceedings.
>
> 4. The Board could order an exclusion of witnesses that would include Mr. Cyr even though he is a party.
>
> The availability of these options or a combination of them, would allow the proceedings to happen, thus militating against a conclusion that the adjournment of these proceedings is inevitably appropriate.
>
> I agree with counsel for the applicants that it is premature to concern ourselves with issues around Mr. Davidson's role as a witness. However, Mr. Davidson's potential choice not to testify voluntarily in these proceedings because of the pending criminal charges (as alluded to in his counsel's letter of March 10, 2006) is also not a basis to adjourn. The Board and the parties regularly face unco-operative witnesses and we have ways to deal with the problem.
>
> However, as counsel have agreed, the law does not permit Mr. Davidson to decline to answer questions in this proceeding. The law merely ensures that his answers cannot criminate him in a subsequent criminal proceeding.

9. I also revealed to the parties some information about the dates on the cards the three unions had collected and rely upon because this was information that the Board possessed that would likely be relevant to the unfair labour practice complaint. I indicated that the cards the applicant unions submitted bore dates between October 6 and November 22, 2005.

10. This matter is referred to the Registrar to schedule the unfair labour practice complaint, along with the applications for certification, for hearing. For clarity, the applications for certification are being listed only because of the remedies being sought in the unfair labour practice complaint.

11. This panel is not seized.

2222-04-ES; 2223-04-E; 2224-04-ES Novaquest Finishing Inc., Applicant v. Abdurahman Abdoulrab, Josephine Adres, et al, and Director of Employment Standards, Responding Parties.; Catelectric Inc., Applicant v. Abdurahman Abdoulrab, Josephine Adres, et al, and Director of Employment Standards, Responding Parties; 4064186 Canada Inc., Applicant v. Abdurahman Abdoulrab, Josephine Adres, et al, and Director of Employment Standards, Responding Parties

Employment Standards – Related Employer – Three applicant companies appealed the employment standard officer's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C", a bankrupt company, and should be treated as one employer pursuant to s. 4 – The Board found that s. 4 requires a finding that both subsections (a) and (b) must be answered positively before there is a declaration of one employer under the section – There must be more than the mere fact that one company is solvent and the other not, before it

amounts to an "effect" under the Act – That is, there must be some connection between the relationship and the insolvency – The Board found there was no evidence that the insolvency of C was caused or affected by its relationship with two of the companies, nor any evidence that any action taken in respect of the third company had the effect, either indirectly or directly, on the entitlements of the employees – Finally, the Board noted that it would not examine whether the principal of C personally had more money to invest in the company, since it would be inappropriate to examine the actions or holdings or personal worth outside the corporation – Application granted; direction to return the monies held in trust

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

APPEARANCES: *Clifton Prophet, Lindsay Cader* and *David Lunn* appearing for Novaquest Finishing Inc., Catelectric Inc. and 4064186 Canada Inc.; *Avvy Go, Elisabeth Brückmann, Ramona Omidvar-Khullar, Luba Szkambara, Katherine Zavitz* and *Claire Mumme* appearing for groups of employees; *Prabhu Rajan* appearing for the Director of Employment Standards.

DECISION OF THE BOARD; April 27, 2006

1. These are employer applications under the *Employment Standards Act, 2000*, S.O. 2000 c.41, as amended, ("the Act") for a review of three Orders to Pay.

2. The Employment Standards Officer determined that the three applicant companies and Catelectric-Dip Corporation ("Cat-Dip") were related businesses and should be treated as a single employer, pursuant to section 4 of the Act. Cat-Dip was the employer of the employees who were not paid termination and severance pay when Cat-Dip went bankrupt. Furthermore, the Officer found the applicants in violation of sections 54, 56, 57, 58 and 64 of the Act as a result of the failure to pay the employees of Cat-Dip termination pay and severance pay. The amount ordered to be paid to the nearly 100 employees was, in total, $963,942.68.

3. In a decision dated October 26, 2005, I determined that the first branch of the test in section 4(1)(a) had been met. At paragraphs 28 to 30 of that decision, I summarized my factual findings and their relationship to the test set out in section 4(1)(a) of the Act:

> 28. Turning first to the relationship among 406 Canada, Novaquest and Cat-Dip, I conclude they have common management, common ownership and common financial control. For the reasons set out in *Baker's Sales and Service (1968) Ltd. (c.o.b. Richmond Hill Toyota)*, supra, the presence of these factors strongly points toward a conclusion that the entities are related. However, I have also found no common trade name, limited movement of employees, separate premises and limited ability to serve the same customers. I am satisfied that the indicators of common management, common ownership and common financial control are so strong, that on balance, the three entities are associated or related businesses meeting the test in section 4(1)(a) of the Act.
>
> 29. Section 4 of the Act, as counsel for the applicants argued, is intended to provide an added level of protection to employees seeking to enforce their minimum rights under the Act. Put another way, section 4 permits a

> decision-maker to look beyond the corporate entity where the employees worked and focus on the relationship the employer may have with other entities who should, in appropriate circumstances, be held jointly and severally liable for breaches of the Act by the direct employer. Section 4(1)(a) and the criteria that have been developed in the jurisprudence are intended to provide guidance as to how far one might look in the employer's "circle" for a potential joint liability partner. Section 4(1)(b) then asks the further discretionary question about whether that potential liability partner should be held liable, having regard to whether the manner in which the partners have organized themselves has the intent or effect to defeat the purposes of the Act. As I set out at the beginning, at this point I am only looking at whether the applicants are potential liability partners. I conclude that the answer is yes, for 406 Canada, Novaquest, and Cat-Dip because of the overlapping ownership, management and financial control.
>
> 30. Turning now to the relationship among 406 Canada, Novaquest and Cat-Dip, with the addition of Catelectric Inc., I readily find that the criteria in the jurisprudence have been met. All four are under common ownership, common management, and common financial control, although not to the same degree as in the Cat-Dip era. Added to that, Cat-Dip and Catelectric Inc. share a common logo, common customers, common employees, the same premises and assets. Their relationship, on Mr. Lunn's evidence meets the test in section 4(1)(a) of the Act.

4. After the Board made the determination that all of the responding parties were associated or related activities and businesses, the evidence of the responding parties continued, but focused more particularly on the second part of the test in section 4(1)(b). I will set out all of the relevant excerpts from subsection 4(1) of the Act:

> 4 (1) Subsection (2) applies if,
>
> (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
>
> (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

5. I do not wish to repeat the evidence and analysis set out in my October 26, 2005 decision. Further, it is only some of that evidence that is relevant to the second inquiry about whether I should use my discretion and conclude that some or all of the responding parties should be made liable to pay the unpaid termination and severance pay. Essentially, I will be focusing on the circumstances surrounding the acquisition of Cat-Dip; how it related to the other companies that are ultimately owned by David Lunn; how Mr. Lunn reacted to the financial drain caused by Cat-Dip, and how, after the bankruptcy of Cat-Dip, its operating assets came to be in the hands of Mr. Lunn, enabling him to establish the "phoenix company", Catelectric Inc.

The acquisition of Cat-Dip

6. Mr. Lunn bought Cat-Dip, an electroplating or e-coat company, from Decoma International, a member of the Magna family of automotive supply companies in March 2002 at a cost of $9 million. Catelectric-Dip had been a division of Decoma. Mr. Lunn bought the physical plant, machinery, inventory, accounts receivable, customer contracts and commitments, intellectual property and goodwill. Mr. Lunn essentially bought all the elements necessary to continue this specialized e-coat business. Before the purchase, Mr. Lunn performed the customary due diligence research and the outcome seemed positive. The Cat-Dip employees were more highly paid than others doing similar work and were more highly paid than the majority of workers at Lunn's other e-coat operations at Novaquest, but the compensation package seemed manageable. Mr. Lunn's research showed that Cat-Dip was producing high value parts for a series of stable customers, many of whom were in the Magna group. But shortly after Mr. Lunn took ownership of Cat-Dip, the reality diverged sharply from his pre-purchase assessment. It is not necessary to set out the challenges Cat-Dip faced in any detail, because there was no dispute about them. At issue is how Mr. Lunn reacted to those challenges and the business choices he made. In summary then, one significant customer was building its own e-coat plant, and took its business inside. Another customer suffered a quality disaster that caused it to lose confidence and take its business elsewhere. Other customers, particularly Magna companies, imposed pricing pressures, where none had appeared to exist before, and took their business away when Cat-Dip would not meet the new price expectations. Throughout the period, Cat-Dip continued to pay the wage package that it had promised to provide the employees, as a term of its purchase from Decoma.

The relationships between Cat-Dip and the other "Lunn" companies

7. Up until the purchase of what became Cat-Dip, Mr. Lunn owned the shares of a single operating company, Novaquest, which also e-coated automotive parts, although using a different process, as explained in more detail in my October 26, 2005 decision. At the time of the Cat-Dip purchase, 4064186 Canada Inc. ("406") was created as a holding company. 406 owned all of the shares of Cat-Dip and Novaquest and Mr. Lunn owned all the shares of 406. This arrangement, Mr. Lunn testified, came about largely at the request of his and Novaquest's banker, the Bank of Montreal ("the Bank"). The Bank established all of its financial arrangements with 406. Money was lent to 406, in a range of credit facilities, most significant, a revolving operating line of credit, secured by all of the assets and receivables of the operating companies, Novaquest and Cat-Dip. Each day, 406 "scooped" all of the money deposited in Novaquest and Cat-Dip, and in turn, provided all of the operating funds necessary. From the Bank's perspective, the performance of Cat-Dip in isolation was not significant. The Bank was concerned about whether 406 was meeting the covenants established as part of the financing arrangements and whether the operating companies, Novaquest and Cat-Dip, were performing in a manner that ensured the Bank's security was protected.

8. In September of 2003, the Bank advised 406 that it was "out of margin" in the amount of $1.6 million, that it was borrowing in excess of the ratio of receivables it had covenanted to maintain. The Bank was not prepared to provide any more money and expected a quick return to margin. Moreover, the Bank was moving the 406/Novaquest/Cat-Dip financial situation to its "special accounts department" which Mr. Lunn later learned meant those accounts where the Bank was concerned its security was not protected and the Bank was anxious to extricate itself as

quickly as possible. Finally, the Bank counselled Mr. Lunn to hire more sophisticated financial advice. Mr. Lunn hired Sean Reid to be the Chief Financial Officer for 406. At the time he was hired, 406 did not have enough funds available to meet the next payroll for the employees of Novaquest and Cat-Dip. As Mr. Reid testified, the financial problems were serious.

9. In November 2003, the Bank hired Richter and Partners ("Richters") to review the 406/Novaquest/Cat-Dip operations and finances and make a report to the Bank. Mr. Lunn testified that he did not see the whole of Richters' report until it was sought by the parties opposite in these proceedings, and some aspects of it were never shared with Mr. Lunn and his colleagues. There is no dispute that Richters' retainer and report were sought by the Bank, for its interests and purposes. Although Mr. Lunn and Mr. Reid do not agree with all of the conclusions in the Richters report, it does serve as a dispassionate assessment of the financial state of 406 at the end of 2003.

10. It is helpful to set out a few of Richters' conclusions. It found that "Catelectric has lost many significant customers. Given high fixed operating costs and relatively expensive labour, Catelectric's viability is questionable". Richters recommended that operations at Catelectric be suspended, and if no significant sales were obtained by January 2004, Catelectric should be shut down. At the time of Richters' report, 406 owed $10.9 million to the Bank, and $4.5 million to subordinate creditors. Richters attributed almost $8 million of the total debt to the Cat-Dip operations.

11. Both before and after the Bank announced that it would advance no more money to 406 and that the company needed to return to "margin", Mr. Lunn was able to obtain an infusion of cash only by going to family members. Mr. Lunn's family members or companies controlled by them, ultimately advanced $5.5 million in return for promissory notes. It was the undisputed evidence of Mr. Lunn and Mr. Reid that there was no commercial basis for the loans. They were unsecured and fell in priority behind the Bank's indebtedness which was already in excess of the value of the businesses. The Director, Employment Standards sought to make something of the fact that some of the loans were made to Novaquest, rather than Cat-Dip. Mr. Lunn explained that there was no particular reason for this. In any event, since the banking arrangements provided that 406 "scooped" all the monies deposited in Novaquest and Cat-Dip on a daily basis and used the funds to service the debt to the Bank, nothing materially turns on which operating company nominally received the benefit of the loan. The only benefit to the family lenders of receiving promissory notes from Novaquest is that the promissory notes survived the bankruptcy of Cat-Dip. But since the debt to the Bank also survived the bankruptcy of Cat-Dip, the family lenders are still sitting behind millions of secured debt, and as of the date of the hearing in early 2006, none of the family loans had been repaid.

12. Mr. Lunn and Mr. Reid led undisputed evidence about efforts to locate new customers for Cat-Dip, and efforts to streamline the operations in the fall of 2003. Employees were temporarily laid off in October and November 2003. Despite those efforts, by December 2003, Cat-Dip was losing $200,000 a month, with no reversal in sight.

13. Mr. Reid testified that by December 2003, it was clear that Cat-Dip could only move forward on a much smaller scale, with a lower cost structure. Mr. Reid said that he prepared a five-month forecast, beginning with the revenues he thought could be generated by sales, and then worked backwards to determine the number of employees and the size of the compensation

structure and other costs that such revenue could support. Mr. Reid testified that if Cat-Dip had to be competitive on the open market, rather than enjoy the loyal support of a particular type of customer, then wages had to be closer to other e-coat plants. The forecast anticipated a smaller number of employees, working for lower wages. On December 19, 2003, a number of employees were given notice of termination. Other employees were offered the choice between a new job at lower wages or termination. A couple of employees were offered jobs on the same terms that they had enjoyed. Employees were selected after an evaluation of their relative skills and ability.

14. Mr. Reid agreed that the forecasts did not budget for the payment of termination and severance pay to any employees. The termination letters did not promise termination and severance pay, but made a vague reference to possible further payments. The Director, Employment Standards suggested to Mr. Reid that Cat-Dip could have offered termination instead of temporary layoffs to employees in September and October 2003. Essentially, the Ministry challenged the *bona fides* of Cat-Dip's decision to temporarily lay off employees in October and November when, on the theory of the Director, Employment Standards, it was very unlikely that they would be recalled. I accept Mr. Reid's explanation that he and Mr. Lunn retained some optimism until mid-December. But in any event, I would not be quick to ascribe poor motives to an employer who legitimately makes use of the Act's mechanisms for implementing temporary layoffs before permanent layoffs. I suppose that the employer's motives might attract some attention if actions were taken in the interim period that imperilled or reduced the likelihood that the employer could meet its statutory obligations to pay termination and severance pay. But in this case, there is no doubt that Cat-Dip did not have the money to pay termination and severance pay at any point after Mr. Reid was hired in September 2003. Even if the employer had made the choice to move the implementation of permanent layoffs from December 2003 back to October 2003, there would have been no impact on the likelihood that employees would have received their statutory termination and severance pay.

The bankruptcy of Cat-Dip and the emergence of Catelectric Inc.

15. In order for Cat-Dip to move forward, Mr. Reid testified that a number of options were considered with its legal and financial advisors. The Bank, Mr. Reid said, did not care what happened, except that it would advance no more money and it wanted its secured debt protected. It was agreed that 406 would remain liable for the total debt, but going forward, it would be secured only on the basis of the assets and receivables of Novaquest. The Bank stipulated that none of the money it would continue to make available to 406 and Novaquest could be advanced to Cat-Dip. Cat-Dip then made a proposal in bankruptcy to its unsecured creditors, most of whom were its former employees. Many of the employees had more than 20 years of service between their tenure at Decoma and Cat-Dip and were owed in excess of $20,000 each. The proposal in bankruptcy would have resulted in the employees receiving 10 to 12 cents on the dollar. Almost half of the employees gave their proxy to a relative of one of the employees, who is a lawyer (although not counsel in these proceedings). The proposal in bankruptcy was soundly rejected, with the result that by operation of statute, Cat-Dip was placed into bankruptcy.

16. Mr. Lunn provided the funds to make the proposal in bankruptcy in January 2004, after the Bank made clear it would provide no more support to Cat-Dip. Mr. Lunn was cross-examined about the amount of money offered to the unsecured creditors and why he was not prepared to offer more. Mr. Lunn testified that he acted on the advice of experts in the area, and I

note that the trustee in bankruptcy recommended to the unsecured creditors that the proposal be accepted.

17. We heard evidence from former employees William Ribiero, Hang Tac Tan and Jan Murray. They explained that many of the Cat-Dip employees were immigrants with limited language skills, who had devoted years of their working lives to the Cat-Dip operation. They testified that they turned down the proposal in bankruptcy because it was so low as to be insulting. Some suggested that they might have been prepared to accept if more had been offered: perhaps they would have settled for half of their entitlements. The employees testified that it has been hard for them and their former colleagues to find new employment, and some have not been successful, even two years later. Without the termination and severance pay to cushion the transition, employees have had a very hard time supporting their families.

18. Mr. Lunn and Mr. Reid testified that they were stunned by the rejection of their proposal. Under cross-examination, Mr. Reid denied that he and Mr. Lunn had thought about what would happen if the proposal was turned down, because all the advice they received indicated that the proposal in bankruptcy would be accepted. However, Mr. Reid agreed that as things turned out, the plan for moving forward was enhanced by the bankruptcy.

19. Mr. Reid said that after the proposal in bankruptcy was turned down, he and Mr. Lunn, along with Richters in its capacity as receiver for the Bank, went to the plant, where the locks were changed. They then had a discussion about what to do next. Mr. Reid said they conveyed to Richters that the plant had to keep operating if it were to retain any value for its creditors. Mr. Reid explained that its customers are just-in-time suppliers to the automotive industry and even a short disruption would see the customers fleeing to other e-coat plants, never to return. A disruption in business would also render Cat-Dip's accounts receivable almost worthless as its former customers scrambled to find new e-coat suppliers, and used the money owed to Cat-Dip to pay the penalties that would be imposed by its automotive customers for late deliveries of parts. Mr. Reid said that Richters made it clear that it knew nothing about the business and was not interested in running it, even in the short term. The talk then turned to the possibility of Mr. Lunn buying the assets of Cat-Dip from the Bank, through Richters. Mr. Reid said that the value of the assets, including equipment and accounts receivable, was well-known because of independent evaluations that had taken place in December 2003 as Cat-Dip looked for new infusions of cash, and even tried to find a buyer.

20. Ultimately, Mr. Lunn and Richters agreed that Mr. Lunn would pay $1,750,000.00 for the equipment and accounts receivable of Cat-Dip. Richters called the Bank who agreed to accept that amount. Mr. Lunn then established a numbered company to purchase the assets and receivables. That company was later named Catelectric Inc. Mr. Lunn owns Catelectric Inc. It operates out of the same premises as Cat-Dip, using the same equipment, employing the same people and courting the same customers as Cat-Dip. In essence, Catelectric Inc. is carrying out the same plan that Mr. Reid developed for a slimmed down Cat-Dip. Of course, as a result of the bankruptcy of Cat-Dip, the severance and termination liabilities owed to the former employees have been wiped out.

Submissions of the parties

21. Counsel for both the Director, Employment Standards and for the groups of employees argue that the only people who have suffered at the end of the day are the employees who have lost their jobs and the significant termination and severance pay that they are owed as minimum standards under the Act. From the employees' perspective, Mr. Lunn has retained the means to operate the business, with the only real change being the shedding of the liability.

22. Counsel for the applicants, in response, argued that the employees' perspective has no regard for the more than $2 million Mr. Lunn's family advanced to Cat-Dip to keep it running as long as it did. Further, Catelectric Inc. has not met its forecast revenues. It lost $360,000 in its first year, and at best, will make a small profit in its second year.

23. The applicants assert that I need to assess whether the principals of Cat-Dip took all reasonable steps to save the company. The case law makes clear that adjudicators will assess the steps taken, particularly in situations where a "phoenix" company arises out of the ashes of the predecessor company. That is the analysis that should follow in assessing whether the effect of the relationship between Cat-Dip and Catelectric Inc. ".... has directly or indirectly defeated the intent and purpose of the Act". That was the approach advocated by the Divisional Court in *Carillon Decorative Products Inc.*, (2004), 71 O.R. (3d) 500. It set out all of the steps that the principals had taken to save the struggling company and concluded that the evidence overwhelmingly established that the principals "made all reasonable efforts" to save it before filing for bankruptcy. Further, the Court found that the small investment made by the principals to start a new company that had some elements in common with the predecessor, "would not have had the slightest effect on the looming disaster…" (page 4) of the struggling company. The Court found that the test in section 4(1)(b) had not been met and, consequently, concluded that the Officer should not have ordered that the related companies be treated as one employer for the purposes of the Act.

24. Counsel for the applicants argued that the facts in this case should lead to the same conclusion. Both before and after 406 was off-margin in the fall of 2003, Mr. Lunn and his family contributed more than $5.5 million that was not commercially sensible, since it all fell behind the debt of the Bank, which was already in excess of the value of the business. Cat-Dip continued to look for new business, new buyers, and a means to restructure to go on as a leaner operation. And when those efforts were unsuccessful, Mr. Lunn made a proposal in bankruptcy, putting up more money that was not commercially sensible, so that the employees, the largest group of unsecured creditors, would receive something. Ultimately, the employees turned the proposal down and bankruptcy resulted.

25. The $1,175,000 that Mr. Lunn raised to purchase the assets of Cat-Dip would not have saved Cat-Dip, counsel argued, so the fact that Mr. Lunn was able to purchase the assets should not lead to a conclusion that the effect of him doing so indirectly defeated the purposes of the Act.

26. The applicants further argued that the effect of the relationship between Cat-Dip, Novaquest and 406 had been nothing but beneficial to Cat-Dip. Cat-Dip began to struggle almost from the beginning in 2002 and survived until 2004 only because of its association with Novaquest and 406. 406 provided the funds that kept Cat-Dip operating, employees employed

and wages paid, even as it was losing $200,000 a month. For its part, the stronger operations of Novaquest provided the revenues to support the credit facilities 406 relied upon to sustain Cat-Dip. Counsel noted that in its report, Richters attributed almost half of the debt owed by 406 to the faltering operations of Cat-Dip. This is not, counsel argued, a situation where the related companies bled funds, or capital or work opportunities from the struggling company, thereby causing or contributing to its demise.

27. It is also not a situation, counsel argued, where operating parts of a single business have been artificially divided into separate corporations to shield assets, in contrast to *550551 Ontario Ltd. V. Framingham* (1991) 4 O.R. (3d) 571 where different aspects of a single business were hived off into various corporations. When Mr. Lunn acquired Cat-Dip, it was a fully operating business, with a different product, customer market, price structure and compensation structure from Novaquest. Mr. Lunn bought the assets that had made up an operating division of Decoma, with the plan to continue the venture, from the same physical location, across town from the Novaquest locations. It made business sense to put the assets that made up that business into a separate corporation. Moreover, the resulting corporate structure stemmed from the preference of the Bank, rather than any consideration of the ultimate effect on employees' rights under the Act and the employer's ability to meet them.

28. Counsel for the group of employees argued that a test that asked only whether the employer had taken all reasonable steps to save the company is not an appropriate measurement when the minimum standards promised to employees under the Act are at stake. All of the employees affected in this case were employed for more than 5 years, some as many as 25 years. They lost long-term job security, and although their skill and labour made a significant contribution to the health and growth of the company, they have no way to protect their investment in it. Unlike secured creditors, they have no way to protect the termination and severance pay debt owed to them by the employer. Employers should not be able to argue that they have taken all reasonable business measures as a defence to a claim under section 4 of the Act.

29. Counsel argued that the intent of the Act, and particularly section 4, is not just to increase the likelihood that employees will be paid termination and severance pay; the Act is intended to guarantee that the minimum standards will be met. Counsel argued that the language of section 4(1)(b) indicates that in the event of a bankruptcy, other entities are to be sought to meet the shortfall. Counsel referred to section 4 as a "deep pockets" provision. Counsel argued that whenever one employer is insolvent, and a related employer is solvent, we should conclude that the "effect" of that relationship defeats the purposes of the Act. Whenever a benefit that has been conferred by the Act has not been met, the related entity should pay that benefit.

30. In this case, counsel argued, Cat-Dip became insolvent, leaving 100 employees without their statutory termination and severance pay. The related entities, 406 and Novaquest, remained solvent. Had Cat-Dip been folded into the Novaquest company when it was bought from Decoma, Novaquest's funds would have been available to pay the termination and severance pay. The choice to operate Cat-Dip as a separate entity is the sort of "effect", counsel argued, that indirectly defeated the purposes of the Act.

31. Counsel for the Director, Employment Standards also submitted that the test articulated in *Carillon Decorative Products Inc.* (above) is not the appropriate test and that I need

go no further than the language of section 4 itself. In this case, counsel argued, Mr. Lunn and the companies he operated had a range of choices to make, and the ability to make those choices. The employees, in contrast, had no choices and lost their minimum entitlements. The choices available included operating Cat-Dip in the same corporation as Novaquest, offering more money to the unsecured creditors in the proposal in bankruptcy, and turning to Novaquest to finance the termination and severance pay obligations. The "effect" of operating Novaquest and 406 as companies separate from Cat-Dip is that the funds to pay termination and severance pay are not available. Ironically, counsel noted, the Bank's security extended over all of the operations, with the result that it did not lose out when Cat-Dip went bankrupt. Counsel relied on *DDSF Frames Inc.*, [1993] O.E.S.A.D. No. 145, which held that there was no reason why the predecessor to section 4 "...should reach any less far, in its protection of employee entitlements, than the Bank instruments reach in the protection of its financing". More recently, in *Zettel Metalcraft Ltd.*, [2000] OLRB Rep. July/Aug. 761, the Board said at 78:

> In my view it would be an incongruous and inequitable result to find that, notwithstanding the evidence of business and financial interdependence among the Zettel companies, when it comes to the obligations owed by Metalcraft to its employees under the Act, those same companies can now claim corporate and legal independence and thus shield themselves from liability. That, in my opinion would defeat the purpose of the Act.

Counsel asked me to reach the same conclusion and extend the protection of the Act as far as the Bank was able to extend the security for its lending.

32. Counsel for the Director, Employment Standards argued that I should look at who benefited and who lost at the end of the day as a result of how the events unfolded. Novaquest benefited, because it "shed" Cat-Dip, although it was left with all of the Bank debt. Mr. Lunn benefited because he received a "phoenix" company debt free and could move forward. Mr. Lunn's family members' promissory notes have some prospect of being paid off, because they are now the debts of Novaquest. In counsel's view, the only people who have lost are the employees.

33. In reply, counsel for the applicants took a different view of who won and who lost. First, Mr. Lunn paid $9 million to buy Cat-Dip and that whole investment was lost. Mr. Lunn's family members' promissory notes remain unsecured and behind Novaquest's bank debt, so they would not appear to be winners either.

34. Counsel also took issue with the various propositions that more money could have been made available to employees. All of those scenarios, counsel argued, ignore the fact that the Bank retained a charge over all of the assets of Cat-Dip and Novaquest for the entire period. It would have been unlawful for Mr. Lunn to seek to circumvent that security arrangement by offering money to employees, ahead of the Bank. And any more money invested in 406 would have been scooped by the Bank to reduce the credit that the Bank had extended and now wished to recoup.

35. Finally, counsel for the applicants summarized the position of the parties' opposite as essentially failing to give effect to section 4(1)(b) of the Act, and ending the analysis at section 4(1)(a), that is, if the entities are related, then the solvent one pays. Instead, counsel argued, real meaning has to be given to section 4(1)(b) and I should find that the "effect" of the responding parties' relatedness has not directly or indirectly defeated the purposes of the Act.

Analysis and decision

36. For ease of reference, I will again set out the language of section 4 of the Act:

> 4 (1) Subsection (2) applies if,
>
> (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
>
> (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

In *PlateSpin Canada Inc.* (2005 CanLII 1637), the Board set out at ¶ 76 the questions it must ask in applying section 4 to the facts before it:

> (a) Are or were associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings carried on by more than one corporation, individual, firm, syndicate, or association or any combination thereof?
>
> (b) Did any corporation, individual, firm, syndicate, or association found to be associated or related employ the claimant during the period of time for which benefits are claimed or the violation of the Act or regulations took place?
>
> (c) Was the intent or effect of carrying on associated or related activities to directly or indirectly defeat the true intent and purpose of the Act?

37. The question in (b) is not disputed; Cat-Dip employed the employees who have made the claim. The question in (a) was answered in my October 25, 2005 decision: yes, all of the applicants were engaged in related activities.

38. Essentially, this part of the proceeding is about answering question (c). First, it is a different and separate question. If the Legislature had intended to impose liability whenever entities were found to have been engaged in related or associated activities, it would have said so. There would be no need then for section 4(1)(b). Consequently, I reject the argument that section 4 is a simple deep pockets provision that requires only a finding of relatedness between a company that can meet its employment standards obligations and a company that cannot. I note that the Divisional Court in *Carillon Decorative Products Inc.* (above) was quite critical of an Employment Standards Officer's decision determining that two entities were related, followed by a conclusion that they should be treated as a single employer without further analysis. The Court said that "…it was necessary for her to go on to find the existence of the intent or effect required by section 4(1)(b)". All of the Board's decisions to date interpreting section 4 have concluded that after relatedness has been found, it is necessary to make a separate inquiry about the intent or effect of that relatedness. In *Platespin* (above), the Board found that the relationship between companies had not caused or resulted in the employer's failure to pay its employment standards

obligations. Instead, it was the insolvency of the employer that had caused the failure. At ¶83, the Board wrote:

> Even if I had found that the two entities were related for the purposes of the Act, as argued by both the Ministry and the applicant, there is nothing to support a finding that the intent or effect of any relatedness of the two entities was to directly or indirectly defeat the true intent and purpose of the Act. Rather, it is apparent that the claimant's claims were defeated by the receivership of PlateSpin. As stated by the Board in its decision in *Simmonds Capital Ltd.* [2004] O.E.S.A.D. No. 601:
>
>> 21.…It is beyond dispute, that when an unrelated employer goes out of business or declares bankruptcy, claims under the Act can be defeated. The fact that certain claims under the Act are defeated by the assignment into bankruptcy of the direct employer, even in a situation where the direct employer is controlled by another entity, does not, on the evidence before the Board in this case, automatically lead to a finding that there was an arrangement, the effect of which was to defeat the purposes of the Act. For example, the evidence does not establish that SCL's bankruptcy was orchestrated or inappropriate or was due to the existence of a relationship between these two entities. For example, there was no obligation on the shareholders to increase their financial investment in order to prop up SCL or take steps to prevent its demise. That being the case, it is difficult to conclude that the inability of SCL to pay its debts and its bankruptcy is an "effect" of the relationship between SCL and Simmonds Capital. Just as the Act is unable to protect an employee's claim when an unrelated employer goes out of business, the bankruptcy of a related entity does not mean that, in every instance, section 12 applies and the other entity is liable for any claim filed under the Act.

39. I adopt that analysis. The mere fact that one company is solvent and the other is not does not amount to an "effect" under the Act. There must be some connection between the relationship and the insolvency. In *Zettel Metalcraft* (above) for instance, the Board found that the key man in two companies used his knowledge of the respective financial health and weakness of related companies to defer a loan payment to the struggling company and to convert unsecured inter-company loans into secured loans to the advantage of the healthy company, thus reducing the likelihood that the struggling company would meet its employment standards obligations to the employees. In that context, it is not surprising that the Board reached the conclusion that it would be appropriate to impose liability for the unpaid benefits on the healthy company.

40. In this case, there is no evidence that the insolvency of Cat-Dip was caused or affected by its relationship with 406 and Novaquest. The evidence is entirely to the contrary. Cat-Dip was propped up by the revenues and financial strength of Novaquest, which, in turn, allowed 406 to maintain the lending relationship with the Bank that supported Cat-Dip's mounting losses. Without Novaquest and 406, Cat-Dip would have failed earlier and without the ability to meet its employment standards obligations.

41. In respect of Cat-Dip, Novaquest and 406, I find that the test in section 4(1)(b) has not been met, with the result that I will not make a declaration that they are a single employer for the purposes of the Act.

42. Turning now to the relationship between Cat-Dip and Catelectric Inc., again there is no evidence that any action taken in respect of Catelectric Inc. had the effect, either indirectly or directly, on the entitlements of the employees of Cat-Dip.

43. This aspect of the case is similar to the fact pattern in *Dolfin.com Canada Inc.*, [2001] OLRB Rep. Jan/Feb. 58. Dolfin was at the point of bankruptcy. Some of the principals of Dolfin invested in a new company called Dolfin.com. The Director, Employment Standards had asserted that the "phoenix" company should be held liable for the unpaid employment standards obligations shed by Dolfin as a result of its bankruptcy. The Board, interpreting the language in the predecessor to section 4, asked whether any "arrangement" between Dolfin and Dolfin.com had the effect of rendering Dolfin unable to meet its statutory obligations. At ¶17, the Board concluded that, in the circumstances, the investors' choice to put money in the new company was not to the detriment of the old company:

> Dolfin was moribund. It was in extreme financial distress. It was about to leave a significant trail of unsatisfied creditors. Its financial precariousness was such that no rational investor would have seen fit to invest funds in the black hole which was the center of its financial core. Indeed, even Mr. Diakow and Mr. Dubreuil, no doubt wisely, declined such opportunities afforded to them to buoy Dolfin's position. New investors were found for a start up company. But there can be no doubt that, presented only with the opportunity to invest in the struggling Dolfin rather than the start up Dolfin.com, those investors would have balked. The principals of Dolfin did not choose to invest money in the new company to the detriment of the old. And those who did invest in the new company simply cannot (even in the perhaps artificial but necessary analysis which may sometimes be required in such cases) be seen to have made a "choice" between the two companies.

I adopt that analysis. Mr. Lunn's choice to purchase the assets of Cat-Dip and use them to start Catelectric Inc. did not have an "effect" on Cat-Dip's abilities to pay the employees. Those payments were not going to be made by Cat-Dip in any event.

44. The Director, Employment Standards suggested that there was some collusion or other inappropriate activity between the trustee in bankruptcy and Mr. Lunn to create a proposal in bankruptcy that was designed for rejection. There is not a shred of evidence to support that serious and, in my view, irresponsible, submission. No evidence was led to even suggest that the amount offered to the unsecured creditors, 10 to 12 cents on the dollar, was unusual. The trustee in bankruptcy, who is an officer of the court, recommended acceptance of the offer. The unsecured creditors, mostly employees, and the very same people who brought these claims, rejected the offer. Of course the employees were free to reject the offer, but it was that unanticipated decision, rather than any action of Mr. Lunn, that finally plunged Cat-Dip into bankruptcy. Essentially, it was the rejection of the proposal in bankruptcy that created the opportunity for Mr. Lunn to acquire the assets of Cat-Dip from the Bank and create Catelectric Inc. In these circumstances, there is no basis to conclude that any action taken by Catelectric Inc. affected the likelihood that the employees of Cat-Dip would receive their severance and

termination pay. Consequently, I will not make a determination that Cat-Dip and Catelectric Inc. are a single employer for the purposes of the Act.

45. A recurring theme in this proceeding was the view of the Director, Employment Standards, supported by counsel for the groups of employees, that the Board should enquire into and have regard to how much more money was available to Mr. Lunn at different points in time. Counsel sought to ask Mr. Lunn about his and his wife's financial worth at the time 406 began to be pressured by the Bank to reduce the credit line it was using to support Cat-Dip and Novaquest. I ruled that such information was not relevant to these proceedings and in final argument, counsel asked me to set out my reasons for that ruling.

46. In questions to Mr. Lunn and Mr. Reid and then in final argument, counsel for the Director, Employment Standards suggested that Mr. Lunn had more money available to make a favourable offer to the employees in the proposal in bankruptcy. Counsel for the Ministry of Labour pointed to the money that Mr. Lunn got access to that allowed him to buy the assets of Cat-Dip and then go on to form Catelectric Inc.

47. Although the argument arose in different contexts, the thesis of the Director, Employment Standards is that I ought to have regard to how much money was available to Mr. Lunn. Moreover, counsel asks me to assess the actions of Mr. Lunn as owner of Cat-Dip, 406 and Novaquest, with consideration to how much more money could have been made available to permit Cat-Dip to meet its minimum standards obligations to the terminated employees.

48. I specifically reject the notion that a determination, pursuant to section 4, should consider how much more money could have been made available by a principal. The Act, and the Board, generally respect corporate structures. It is only in limited circumstances that the Board has the discretion to pierce the corporate veil. Cat-Dip was a corporation, with an existence separate and apart from Mr. Lunn. As a starting point, I must look at the decisions made by the Cat-Dip corporation and determine whether they were reasonable business decisions. Not all companies will succeed. Not all companies will be able to meet all of their financial obligations, including their employment standards obligations. I agree that the Act sets minimum standards, but it does not provide any guarantees that employees will receive them. Those minimum standards exist within a web of laws that grant priority over the assets in an unsuccessful business to secured creditors, in this case, the Bank. Those minimum standards exist within a legal framework that permits a struggling company to go bankrupt, and in the process, shed its liabilities. The legal framework that governs companies also permits struggling companies to make proposals in bankruptcy to creditors, with the possibility of providing creditors with some recovery of the debt owed.

49. The existence of these legal mechanisms, and the fact that debts to employees for termination and severance pay have not been given priority over debts made to secured creditors means that the Act's minimum standards are not guaranteed to employees or even, to be realistic, likely to be paid to employees in the event of a company's demise. There are typically many people with better-protected interests ahead of the employees. Whatever one might think of the fairness of such a scheme, it is the one that exists.

50. In this case, three corporations have been named as potential joint liability partners and, for that reason, section 4 permits me to look at their relationship with Cat-Dip and whether

the way in which they are all organized had the intent or effect of defeating the employees' entitlement. But neither Mr. Lunn nor members of his family are named as responding parties, nor should they be. They are investors, owners and lenders and directing minds in the corporations at issue. But they are not "stand-ins" or alter egos to the corporate entities. In *Bilt-rite* (above) the Court held that an individual, other than a sole proprietor, was not subject to what is now section 4. At ¶65, the Court said: "If it was the intention of the Legislature to engulf citizens in their personal capacity, outside a sole proprietorship, and outside the corporate veil, in what is little short of confiscatory legislation, they must do so in clear, unambiguous language". I adopt that analysis. I am entitled to look at whether Mr. Lunn made sound and reasonable decisions as an owner of the corporations, but not to his actions or holdings or personal worth outside those corporations.

Disposition

51. I direct the Director, Employment Standards to return the monies being held in trust, any accumulated interest, and the administrative fee paid, to the applicants forthwith.

3336-05-R Service Employees International Union, Local 1.on, Applicant v. **Oakwood Retirement Communities Inc.**, Responding Party v. Canadian Health Care Workers (CHCW), Intervenor

Certification – Fraud – Membership Evidence – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

BEFORE: *Mary Anne McKellar*, Vice-Chair, and Board Members *R. O'Connor* and *L. Wood.*

DECISION OF THE BOARD; March 1, 2006

1. This is a displacement application for certification.

2. By decision dated January 10, 2006, the Board directed that a representation vote be held on January 12, 2006. Of the 549 ballots cast, 338 were cast in favour of the applicant ("SEIU") and 199 were cast in favour of the intervenor ("CHCW"). 12 ballots were not counted. If the results of the vote are to govern, the Board should issue a certificate to SEIU, and should declare that CHCW's bargaining rights are terminated.

3. CHCW takes the position that a certificate should not issue to SEIU, notwithstanding the results of the vote, because of certain conduct it alleges SEIU has engaged in and which it characterizes as amounting to fraud. These allegations, all of which are denied by SEIU, may be briefly summarized:

> a) An SEIU organizer told employees they had to sign a union card as a condition of employment, and then presented them with an application for membership in SEIU despite the fact that CHCW was the certified bargaining agent;
>
> b) In support of this application, SEIU submitted applications for membership that it had received in the mail, but which nevertheless bore a "witness" signature;
>
> c) The Form A-4 (Declaration Verifying membership Evidence) did not disclose that any cards had been mailed in, and the declarant failed to make any inquiries of the individual signatories, nor did he ascertain whether collectors had made such inquiries;
>
> d) A number of employees who had signed applications for membership in SEIU asked for their cards back, but SEIU refused to return them.

4. SEIU and CHCW have filed extensive submissions on these issues. SEIU seeks to have the Board dismiss CHCW's allegations without a hearing in accordance with Rule 39.1 of the Board's Rules of Procedure.

5. On an application for certification the Board is statutorily precluded from holding a hearing to determine either: (1) the voting constituency; or (2) whether at least 40% of the employees in the proposed bargaining unit appear to be members of the applicant (section 8(4)). There is no exception to this provision where fraud is alleged.

6. On an application for certification, the Board is statutorily precluded from considering any challenge to the membership evidence filed by the applicant (section 8(9)). The only circumstance in which the Board may consider a challenge to membership evidence is in the context of an application for a declaration of fraud under section 64 of the Act. See *R-Theta Inc.*, [1997] OLRB Rep. Jan./Feb. 116; and *Premco Manufacturing Ltd.*, [2003] O.L.R.D. No. 299.

7. Section 64(1) and (2) provide as follows:

> **64.** (1) If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.
>
> (2) Subsection 8(9) does not apply with respect to an application for a declaration under subsection (1).

8. With one possible exception (which we deal with starting at paragraph 14 below), the allegations raised by CHCW do not amount to a fraud on the Board.

9. We deal first with CHCW's allegations set out in paragraph 3(a) and 3(d) above that a SEIU representative made misrepresentations to employees about the purposes for which membership applications were being collected, and that SEIU refused to return cards to employees who had signed them. The Board has always distinguished between a party's misrepresentations to employees and its misrepresentations to the Board. Only the latter may be considered "fraud" and only where the misrepresentation was known to be false and where the Board relied upon it. In *Great West Timber Limited*, [1987] OLRB Rep. Jan. 51, the applicant union brought a displacement application for certification. It won a two-way vote with the other union and the Board certified it. Subsequently, the incumbent union alleged and proved that a representative of the applicant had circulated to employees a letter that he had forged but which appeared to be the legal opinion of a well-known labour lawyer. The Board found that these circumstances did not amount to fraud within the meaning of the predecessor to section 64:

> 10. ... Fraud within the meaning of section 58 has consistently been interpreted to mean "fraud upon the Board": "it must be demonstrated that a false representation was made to the Board which the Board relied on and also that the representation was known, or ought reasonably have been known by the purveyor thereof to be false" (*Ontario Taxi Association 1688*, [1981] OLRB Rep. Sept. 1280, at paragraph 19). The "representation" in the case before us is that the Hunter letter was written by Mr. Wray, or, at least, by a lawyer and had been written for the Great West Timber situation. Mr. Hunter knew that was not the case. However, the Hunter letter was not before the Board when it certified CPU; it played no part at all in the Board's decision to certify the CPU, a decision based entirely on the outcome of the vote held on August 28, 1986. In our view, section 58 does not apply to the circumstances of this case.

10. Alleged misrepresentations to the employees about the significance of signing a card cannot constitute fraud on the Board. Nor can a refusal to return employees' cards. The employees did sign the cards. There is simply no assertion in this case that the cards submitted with SEIU's application were not signed by the persons whose names appear on them, regardless of the circumstances in which the cards came to be signed or came into or stayed within the possession of SEIU. Thus, there is no allegation that the membership evidence itself is false, and there is no allegation that a false statement about the purpose of the cards was made to the Board. Submitting them to the Board is consequently not a misrepresentation. CHCW's allegations in

paragraphs 3(a) and (d) above do not constitute fraud on the Board. Furthermore, the Board is satisfied that if the employees subsequently regret signing union membership cards for whatever reason, their remedy is at the ballot box. See *Premco* at paragraph 22. We also note that even when the pre-1995 card-based certification regime was in place, a union's refusal to return membership cards to employees did not cause the Board to discount those cards when determining the level of membership support. See *Havlik Technologies Inc.*, [1992] OLRB Rep. Apr. 468; *Lutheran Nursing Home (Owen Sound)*, [1994] OLRB Rep. Oct. 1362; and *Tim Horton Donuts*, [1995] OLRB Rep. Feb 187.

11. Turning now to the allegations made by CHCW and set out in paragraph 3(b) above, we are of the view that a failure to actually "witness" the signing of membership cards also does not amount to fraud on the Board. *Transcor Inc.*, [1993] OLRB Rep. November 1233, is a case decided under the old pre-1995 card-based certification system. In this case, the applicant union had made an earlier certification application. In that application it submitted membership cards that its in-plant collector had signed as a "witness" to employee's signatures prior to the cards being signed by the employees themselves. The union withdrew that application and filed a second application. The same collector was involved in collecting membership evidence for that application. The responding party employer argued that the collector's actions in the first certification application amounted to fraud, and that his continued involvement in the second application tainted it, such that the Board should disregard all membership evidence filed and dismiss the application. The Board made the following finding with respect to the fraud issue:

> 44. The circumstances here most closely resemble those in the *Ontario Hospital Association* case. The "pre-witnessing" of cards is conduct similar in nature to attesting to the receipt of the dollar payment although not collected by that person. As indicated earlier, the Board in the *Ontario Hospital Association* case did not consider that conduct to amount to a fraud on the Board. More to the point, it did not view the conduct in the first application as having any effect on the membership documents filed in the second application in circumstances where that new evidence was itself not impugned in any way.
>
> 45. In assessing the reliability of the cards filed the Board need be confident that the person whose name is reflected on the card actually signed the document and has thereby indicated their wishes with respect to union representation. The signature of a witness provides at best, confirmatory evidence. In the absence of any impropriety of any nature with respect to new membership evidence filed there is no basis for exercising the discretion to order a representation vote or to dismiss the application and I decline to do so.

12. *Transcor Inc.* thus stands for the proposition that the fact that a purported "witness" to the cards did not actually see them being signed did not amount to fraud in the absence of any evidence that the persons whose names appeared on the cards as applicants for membership in the union had not signed them. This decision was made in a context of a regime where trade unions stood to be certified on the basis of cards alone (without a representation vote) and we find its reasoning even more compelling in circumstances where employees' wishes are tested by representation votes. The reasoning in *Transcor Inc.* provides a sufficient basis on which to dispose of CHCW's allegations set out in paragraph 3(b) above.

13. We turn now to the issues related to allegations of mailed-in membership applications. In *Premco*, the Board specifically held (at paragraph 10) that the failure to note in Form A-4 that some membership evidence was received in the mail does not amount to a fraud on the Board. We agree. This disposes of a portion of CHCW's allegations set out in paragraph 3(c) above.

14. The only outstanding assertion of fraudulent conduct therefore relates to the CHCW's allegation as set out in the balance of paragraph 3(c) above, namely, that the SEIU declarant failed to make any inquiry either directly of those persons who had mailed in cards, or indirectly of collectors who may have contacted those individuals, to assure himself that those individuals had in fact signed cards. In its most recent submissions to the Board dated February 2, 2006, CHCW has identified three individuals who have advised it that they mailed in membership cards and that no one from SEIU called them to confirm that they had done so. CHCW relies on the Board's statements in paragraph 23 of *Premco* that "the failure to make any inquiries to determine whether mailed-in membership cards were signed by the employee whose name appears on the card is a fraud on the Board unless the Form A-4 declaration notes an exception on the Form A-4". This is the statement in Form A-4 that relates to the issue of inquiries:

> On the basis of my personal knowledge or inquiries I have made, the documents were signed by the employees indicated on the documents, except in the following instances: [no exceptions noted]

15. The portion of paragraph 23 of *Premco* was *obiter* to the conclusions reached in the case because there was no allegation that the Form A-4 declarant failed to make inquiries. Further, the statement is not supported by reference to any Board case law. An examination of the jurisprudence reveals that the Board has not historically treated a failure to make inquiries about the provenance of cards as a species of fraud. Rather, under the card-based certification regime, the Declaration Verifying Membership Evidence was characterized as essential to assuring the "integrity of the system", that is, the reliability of the cards as an indicator of membership support. See *P & M Electric (1982) Ltd.*, [1988] OLRB Rep. Aug. 843 at ¶ 14. A failure to file a declaration at all was treated the same way as filing a declaration where the declarant had made no inquiries: the Board would not give weight to any of the membership evidence submitted. See *Pietrangelo Masonry*, [1981] OLRB Rep. Feb. 218; *Westinghouse Canada Inc.*, [1986] OLRB Rep. Feb 295, and *Estonian Relief Committee in Canada*, [1989] OLRB Rep. May 440. In *Westinghouse*, the declarant made no inquiries and the Board gave no weight to the evidence filed, but it also noted that the failure to make inquiries was not an attempt to mislead the Board, which comment is incompatible with CHCW's assertion that SEIU's alleged failure to make inquiries with respect to three mailed-in cards amounts to fraud.

16. We are of the view that the alleged failure to make inquiries about three mailed-in cards does not constitute fraud on the Board. Even if it were so construed, however, the fraud did not form the basis on which SEIU is in a position to be certified. We note that SEIU submitted 422 membership application cards in support of this application when 375 would have been sufficient based on the largest number of employees estimated to be in the bargaining unit. It is therefore difficult to successfully contend that the Board's determination to hold a vote could have turned on the accuracy of the Form A-4 representations as they may have pertained to three individuals. Additionally, the Board has already relied on the Form A-4 representation to the full extent that it will ever do so. It has relied on it in determining whether the requisite degree of apparent membership in the proposed bargaining unit existed to warrant a vote. It did that without a hearing, as it was required to do by the Act. The question the Board now faces is

whether to certify the applicant in accordance with the results of the vote. The materials filed with the application (the membership cards and Form A-4) have no bearing on that question. Additionally, it is clear from the language of section 64 that even where fraud on the Board is established, the Board retains the discretion to terminate the bargaining rights of a trade union. In these circumstances, the alleged fraud as particularized is that three individuals sent in membership cards and SEIU did not call them to confirm that they had done so, although the Form A-4 declaration suggested that inquiries had been made. In other words CHCW acknowledges that if SEIU relied on cards signed by these individuals, the cards were in fact signed by them. CHCW has not made any assertions that even one of the 422 cards submitted by SEIU was not in fact signed by the employee for whom it purported to constitute an application for membership. There is no "cloud" whatsoever on the membership evidence. More than 60% of the affected employees have voted in favour of representation by SEIU, and they have done so in a secret ballot, the conduct of which has been certified by all the parties. In these circumstances we are not persuaded that we should decline to give effect to the results of that vote. We note that under the old card-based certification system, where an applicant relied on mailed-in cards about which it had made no inquiries, the Board was satisfied that a representation vote could cure any concerns it might have about the reliability of that evidence. See *Seeburn Division of Ventra Group Inc.*, [1994] OLRB Rep. Nov. 1585 at ¶ 20. Comments of a similar nature are also found in *Frankel Steel Limited*, [1984] OLRB Rep. Jan. 28 at ¶16.

17. For all of the foregoing reasons, the Board finds that the representations made by CHCW do not state any basis on which we could or should disregard the results of the representation vote and decline to certify SEIU.

18. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all Long Term Care and Retirement Home employees in the following locations (except The Village of Riverside Glen Retirement Home; 60 Woodlawn Road East, Guelph N1H 8M8) located at the following addresses: The Village of Tansley Woods (1999 Itasbashi Way, Burlington L7M 4W8), The Village of Sandalwood Park (425 Great Lakes Drive, Brampton L6R 2W8), The Village of Erin Meadows (2930 Erin Centre Blvd., Mississauga L5M 7M4), The Village of Humber Heights (2245 Lawrence Avenue West, Etobicoke M9P 2A2), The Village of Taunton Mills (3800 Brock Street North, Whitby L1R 3A5), The Village of Riverside Glen Long Term Care Facility (60 Woodlawn Road East, Guelph N1H 8M8), save and except nurse managers, registered nurses, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and all persons providing contractual services.

19. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

20. A certificate will issue to the applicant.

21. The Board declares that Canadian Health Care Workers (CHCW) no longer represents the employees of Oakwood Retirement Communities Inc.

22. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

23. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until 15 days from the date of this decision.

2074-05-G International Union of Elevator Constructors, Local 96, Applicant v. **Otis Canada Inc.**, Responding Party

Construction Industry – Construction Industry Grievance – Discharge – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

BEFORE: *Norm Jesin,* Vice-Chair.

APPEARANCES: *Angela Habraken* and *Ron McNevin* appearing for the applicant; *M. Patrick Moran, Ken Reid* and *Andrew Reistetter* appearing for the responding party.

DECISION OF THE BOARD; March 17, 2006

1. This is a referral of a grievance pursuant to s. 133 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act").

2. The grievance alleges that the grievor was terminated from his employment with the responding party without just cause, contrary to Article 2.03(b) of the collective agreement binding on the parties.

3. The responding party is engaged in both the construction of elevators and in the service, maintenance and repair of elevators. The grievor commenced his employment with the responding party in or about October, 2002 and was terminated as a result of certain incidents which took place on August 22 and 24, 2005.

4. According to the collective agreement, seniority is based on the period of employment in the industry rather than employment with a particular employer. The grievor is therefore considered to have seniority of approximately 15 years for layoff and recall purposes, although his service with the company was less than three years at the time of his termination.

5. The grievor was initially employed by the responding party to perform construction work. On or about April 26, 2005 the grievor received a written warning as a result of a physical altercation between himself and another employee. As a result of the incident the grievor was barred from the site by the responding party's client. In addition, the responding party issued a written warning to the grievor indicating that if he were to become involved in a similar incident his employment would be terminated.

6. The grievor was then moved from construction into a maintenance position under the supervision of Ken Reid. Mr. Reid is a field manager for the responding party and is responsible for the management of the maintenance of elevating devices in certain commercial properties within his territory. One of the routes that fell within Mr. Reid's supervision was route 19. That is the route that the grievor was assigned to. A key client on that route was a client I will refer to as M. M had a number of properties that fell within route 19, including one high profile property that required significant attention for maintenance. I will refer to that property as M1.

7. Mr. Reid testified that during the time that the grievor worked on this route there was no negative issue with the quality of his work. He described the grievor as having a very good mechanical mind. He said that although the grievor was weak on process he was "catching on".

8. The grievor in his evidence did not express the same positive view of his own ability to handle the maintenance work. He described route 19 as the most difficult route. He indicated that he was overwhelmed with the amount of work, and with backlog of jobs requiring his attention. He was unable to make a sufficient dent into this backlog because of the time he was required to spend dealing with urgent matters such as entrapments. (Entrapments describe situations in which individuals are trapped in elevators and need to be released). The grievor claims he informed Mr. Reid a number of times of these difficulties and sought a transfer back into construction. He also claims that the frustration arising from the difficulties he encountered contributed to the final incident resulting in his discharge.

9. The first incident occurred on August 22, 2005. On that date, Mr. Reid had assigned the grievor to begin performing some of the backlogged work contained on a consultant's list for M1. In order to perform that work the grievor had to enter a storage room where certain equipment was situated. On that day the grievor's electronic key to the storage room was not working. As a result the grievor went down to a "console office" where two security guards were present. He went there to ask the guards to provide him with a working key. According to the evidence of one of the guards – K – the grievor was not supposed to cross past a book shelf when entering the office. Nevertheless, he went past the shelf and spoke to the other guard in a loud voice when the other guard was on the phone. The other guard then asked the grievor twice to

step back behind the shelf. The grievor did not do so. That guard then put his hand on the grievor's shoulder in an attempt to move the grievor behind the shelf. The grievor then shouted to the guard "Don't you ever fucking touch me". The grievor then dropped his key and left.

10. In his evidence the grievor acknowledged that he inadvertently went behind the shelf. He indicated he was only asked once to leave. He stated that he was pushed by the guard and therefore sought to complain to Mr. Reid about the guard. He acknowledged cursing and he also acknowledged slamming his key on the counter, but he stated that he left and avoided any altercation with the guard.

11. Upon hearing about this incident, Mr. Reid met with one of the key contacts for M. Mr. Reid undertook to explain M's rules to the grievor and to apologize to the guards. He also said he would ask the grievor to ensure that he would be more respectful of the guards in future. According to Mr. Reid, the grievor agreed to this request.

12. There is some discrepancy between the evidence of the grievor and Mr. Reid over whether Mr. Reid made a complaint to M about the guard. The grievor claims Mr. Reid told him he did make such a complaint. Mr Reid denies this. Although I accept Mr. Reid's evidence that he conveyed no such complaint, in my view nothing turns on this discrepancy.

13. Until the August 24th incident, no further action was taken regarding the incident with the guards.

14. August 24, 2005 was a difficult day for the grievor. Again, the grievor was assigned to work at M1. When he arrived he was informed by K that there was an entrapment in one of the parking lot elevators, number 6. He was initially assigned to work that day with another employee, but that employee was called and asked to go to another location. Before leaving, however, he agreed to assist the grievor to resolve the entrapment situation. Together they released the elevator and its passenger and the other employee left.

15. Shortly afterwards the grievor was informed that the number 6 elevator had become entrapped a second time. The grievor now had to resolve the problem on his own and he did so. In order to gain access to elevator number 6, the grievor commandeered elevator number 7. This was necessary as number 6 was stuck between two floors. The grievor had to position elevator number 7 to a point that would allow him to move across to enter number 6 from its roof.

16. Before taking number 7 the grievor called to see if anyone was in that elevator. No one answered. The grievor therefore called it up between the two floors. What he did not realize was that there were indeed some people (2 employees of M) in number 7 when the grievor commandeered it.

17. After releasing number 6 the grievor was told by K that there was a new entrapment in number 7. The grievor quickly realized that in fact he had caused the entrapment in elevator number 7. As he was about to start work on releasing number 7, his pager started to go off. (The responding party has a system of dealing with emergency entrapments through what is referred to as its "Otis line". Through that system, emergency calls are communicated directly to the responding party's head office which in turn pages the mechanic responsible for servicing the particular equipment which is the subject of the emergency). The grievor's pager went off more

than once. By this time the grievor's level of frustration and stress had reached the breaking point. The grievor then took his pager, threw it against a wall and broke it.

18. In his evidence, K acknowledged that although he was in the area where the pager was thrown, the grievor did not throw the pager in his direction. The grievor's frustration was directed at the situation and his own role in causing the last entrapment. It was not directed at K.

19. In his evidence the grievor described his action as a momentary lapse of judgement. He indicated that he apologized to K immediately for his action. Nevertheless K informed his superiors about the incident and M in turn informed Mr. Reid that they wanted the grievor removed from their property. Mr. Reid then asked the grievor to go home and indicated that they would discuss the matter the next day.

20. The grievor did not return the next day. Instead he sought an appointment with his physician. He was unable to get an appointment for two days. In the meantime, Mr. Reid met with the acting branch manager for the responding party and with an acting supervisor, Mr. Larry Fairservice. They reviewed the grievor's record and the incidents in question. They then consulted with the responding party's Human Resources department and determined that they had no other choice but to terminate the grievor's employment.

21. As the grievor did not return to work on either August 25 or 26, 2005 Mr. Reid contacted Ron McNevin, the applicant's representative and informed him of the responding party's intention to terminate the grievor's employment. Later that day, Mr. Reid received a message from the grievor indicating that his physician insisted that the grievor stay off work for two weeks. Mr. Reid therefore couriered a letter to the grievor informing him that he was being dismissed.

22. Evidence was presented to establish that the grievor had been taking medication for some time after being diagnosed with depression. The grievor testified that when he worked in construction he had discussed his medical issues with Mr. Fairservice and that Mr. Fairservice told the grievor about the responding party's employee assistance program. There was some dispute in the evidence over whether Mr. Fairservice was a management or bargaining unit employee. The grievor certainly thought he was a supervisor and Mr. Reid did describe him as an acting supervisor in his evidence. In any event, the evidence did not establish that there was a connection between the depression and any of the conduct under review. I therefore do not think much turns on this point.

23. Counsel for the responding party submitted that discharge was the appropriate response to the grievor's conduct on August 22 and 24, 2005. He noted that the grievor had been previously barred from a client site and warned that a repetition of similar behaviour would result in his employment being terminated. He indicated that the grievor, when working on a client's premises, was the responding party's representative to the client and therefore had a special responsibility to ensure his conduct was appropriate. He further relied on the Board's decision in *Ontario Hydro*, [1990] OLRB Rep. Dec. 1308 in suggesting that a suspension or other form of progressive discipline was neither necessary nor appropriate in a construction industry case such as this one.

24. Counsel further noted that the grievor himself stated that he could not perform the job he was assigned to and given the fact that two clients no longer wish the grievor to be present on their premises, the responding party should not be forced to find other work for him.

25. Finally, counsel relied on a number of decisions in which discharges were upheld for intemperate displays of anger, including the decision of the Board in *BFC Industrial Nicholls Radtke Ltd.*, [1997] O.L.R.D. No. 3385. In that case the Board upheld the discharge of a relatively short term employee (approximately six months seniority) for fighting on the job. In upholding the discharge the Board noted that the grievor had been warned about fighting on two previous occasions and that he had shown no remorse over his conduct.

26. Counsel for the applicant countered that the Board has accepted that progressive discipline should be applied in cases such as this where the employment relationship is of a longer duration than is normally seen in the construction industry and resembles the type of stable relationship normally seen in industrial settings. In support of this argument counsel relied on three cases in the elevator construction industry in which the Board substituted a suspension for a discharge. Those cases are *Schindler Elevator Corp.*, [2002] O.L.R.D. No. 334, *Otis Canada Inc.*, [2001] OLRB Rep. Nov./Dec., 1415, and *Thyssen Dover Elevator Ltd.*, [2001] O.L.R.D. No. 1358.

27. Counsel further submitted that the incidents of misconduct were minor in nature and that the entrapments of August 24, 2005 the grievor's growing frustration on that day and his medical condition all contributed to his admitted overreaction in throwing the pager. Counsel noted that the grievor apologized for throwing his pager and that he should not have been subjected to more than a written warning. Counsel also asserted that the responding party should not be able to rely on the wishes of its clients without having had established that it had no other work for the grievor.

28. I agree with counsel for the responding party that the incidents of August 22 and 24, 2005 were more than minor in nature. The grievor had previously been warned about an incident in which he was involved in an altercation. That incident resulted in his being barred from the client's premises. Yet shortly afterward he was involved in two incidents. The first involved a dispute with a guard over an alleged breach of the client's rules. Rather than simply avoid the dispute, the grievor cursed and slammed his keys in front of the guard in a display of anger. In the second incident, the grievor certainly had every cause to be stressed and frustrated. But again, he was unable to control his anger and threw his pager with such force that it broke. Together these three incidents represent a pattern in which the grievor has difficulty in controlling his anger in difficult circumstances.

29. This is especially problematic when the grievor is required to be employed on a client's premises, whether on a construction site or in a hotel, condominium or office tower. It is one thing for an employer to have to manage an employee's behaviour on a shop floor. The employer cannot be expected to have as much patience or tolerance when the employee's misconduct is displayed in the presence of the employer's clients.

30. Having said that, there is reason, in my view, to mitigate against discharge in this case. The grievor's record does not indicate that the grievor had been a problem in the first two years of his employment with the responding party. Indeed, the evidence suggested that but for

the three incidents in question, the grievor has been a conscientious employee who gives his best effort on behalf of the responding party. The grievor impressed me as someone who took his job to heart and became very upset when he was unable to perform his job to his own standards or those set by the responding party. I also note that the responding party appeared to value the work and effort of the grievor and chose to discharge him only after M barred the grievor from its premises.

31. Significantly, the grievor immediately knew he should not have thrown the pager. The grievor expressed genuine remorse over this incident. I accept that the grievor threw the pager in a momentary display of anger and frustration.

32. I agree that there is a place for progressive discipline in cases such as this one. I am mindful of the fact that two of the responding party's client's have now barred the grievor from their premises as a result of the grievor's display of anger. However, I do not think that discharge is warranted in the circumstances of this case. The conduct in this case is not as serious, in my view, as the conduct in *BFC Industrial Nicholls Radtke Ltd., supra*, and the other cases relied on by the responding party.

33. I also note that the indication by the two of the responding party's clients barring the grievor from their premises, though significant, is not determinative of this matter. In *Schindler Elevator Corp.*, [1998] O.L.R.D. No. 3694, the Board stated that the determination by a client barring an employee from its premises does not by itself support a decision to discharge an employee. At paragraph 26 the Board stated:

> 26. There may be circumstances in which an employer will have no choice but to discharge an employee because of the position of a third party which controls the work site. However, even *Crump, supra*, and *Babcock & Wilcox, supra*, specify that that is the case only where the employer has no other work available for the employee and has independent just cause for discharge.

34. I note that the evidence before me has not established that the responding party has no other work for the grievor.

35. Having regard to all the circumstances of this case it is my determination and direction that the responding party reinstate the grievor into his employment forthwith. The discharge is to be removed from the grievor's record. I do think that a significant penalty is warranted, however, to impress upon the grievor that he cannot continue to display a loss of temper on the job. Therefore, the period of time from the discharge to the date of this decision is to be treated as a period of suspension and the employer is not required to compensate the grievor for the period of suspension.

36. I am hopeful that the grievor can have a productive relationship with the responding party that is beneficial to both parties. That can only occur if the grievor can keep his emotion and anger under control. In that regard I would strongly suggest that the grievor take advantage of the responding party's employee assistance program. I would invite both parties to discuss with the grievor what assistance might be available in this regard.

37. There is one other matter which arose after the hearing that I will briefly touch on.

38. During the hearing the grievor was cross-examined about a matter relating to his prior employment with a different employer. After the hearing counsel for the applicant wrote the Board in an attempt to correct the record on this matter. Counsel for the responding party wrote the Board in response and strenuously objected to applicant counsel's letter.

39. It is very rare that the Board would hear evidence after a hearing was completed. It would be rarer still for the Board to accept a contested statement of fact asserted after the hearing without evidence. The correspondence has therefore had no bearing on my decision. I also note that, in any event, the evidence on the matter of concern did not disclose any facts that impacted on this decision.

40. I remain seized to deal with any difficulties in implementing this decision.

3627-05-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **PRW Excavating Contractors Ltd.**, Responding Party

Certification – Construction Industry – Practice and Procedure – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

BEFORE: *Corinne F. Murray*, Vice-Chair, and Board Members *G. Pickell* and *A. Haward.*

DECISION OF THE BOARD; April 3, 2006

1. This decision deals with a request by counsel for PRW Excavating Contractors Ltd. ("PRW") that the Board reconsider its decision dated February 10, 2006 certifying the applicant as the bargaining agent for all construction labourers employed by PRW and working in the province-wide industrial, commercial and institutional sector and in all other sectors of the construction industry in Board Area No. 5. The Board dealt with the application under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It certified the applicant on the basis of only the information provided in its application because PRW failed to file the information prescribed in subsection 128.1(3).

2. By letter dated February 16, 2006, PRW alleges that the applicant "misrepresented" information with respect to the number of PRW employees who were performing labourers' work on the application filing date, February 2, 2006. Based on this alleged misrepresentation, PRW requests revocation of the certification and dismissal of the application pursuant to subsections 128.1(5) and 114(1) of the Act. PRW asserts that only one of its employees was doing labourers' work on February 2, 2006, whereas the applicant indicated that there were three doing this work that day.

3. In support of its assertion, PRW filed statements signed by four of the five PRW employees who were allegedly at work that day to support this assertion (two of whom also filed membership cards in another union). PRW argues that since the fifth employee was the only one performing labourers' work on February 3, 2006, the application must be dismissed based upon the specification in section 9(1) of the Act that each of the bargaining units the Board finds appropriate must consist of more than one employee.

4. The applicant opposes PRW's request. It denies any misrepresentation in its application and asserts that there is no other conduct on its part that should cause the Board to exercise its discretion under subsection 128.1(5) of the Act. The applicant characterizes PRW's request as "merely an attempt" to file a "late" submission of information that is not permitted under subsection 128.1(4) of the Act as determined in *Air Kool Ltd.* [2005] OLRB Rep. July/Aug. 525.

5. The responding party does not dispute the accuracy of the certificate of delivery filed by the applicant showing timely delivery of the required documents by facsimile. It also does not deny that it failed to file any response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and failed to provide the requisite information within the time stipulated by subsection 128.1(3) of the Act. PRW also does not seek permission to file this information beyond the statutory deadline set out in subsection 128.1(3) of the Act.

6. The statements by the four employees are hand written and minimal, e.g. "To whom it may concern: On Feb. 2/06 I was operating the excavator at Vincor" (illegible signature). There is no suggestion that the alleged misrepresentation is due to falsification of individuals' names. The alleged misrepresentation is that the applicant included too many employees in its organizing campaign and in its proposed bargaining unit based upon arguably false conclusions about the work those employees were doing on February 2, 2006.

Decision

7. PRW's request seeks permission, based upon allegations of misrepresentation, to challenge and change the information the applicant provided in its application with respect to the number of employees in its proposed bargaining unit. This challenge is substantively the same as what could have been pursued if PRW had filed the information specified under subsection 128.1(3) of the Act. Therefore the question is whether PRW has made out a *prima facie* case of misrepresentation that could persuade the Board to exercise its discretion to restore to PRW the opportunity it missed by failing to file information under subsection 128.1(3) of the Act.

8. An important consideration in answering this question is that it is raised in the context of a reconsideration request, not as an allegation made in the normal course of the application

being dealt with under section 128.1 of the Act. The Board has consistently used the power to reconsider its decisions under subsection 114(1) of the Act because of the need for finality, particularly in relation to adjudication in labour relations. The Board has sought to strike a balance between the community's interests in finality and the competing value of correcting its decisions that are wrong at law or were otherwise made in error. Where there is new evidence that was not previously available, even with the exercise of due diligence, and that new evidence would likely conclusively determine the case differently, the balance tips in favour of reconsideration. The power to reconsider can provide an opportunity to a party to make representations or objections that it was not given a chance to make before a decision was rendered (see *K-Mart*, [1981] OLRB Rep. Feb. 185). The Board will reconsider when the original decision is wrong at law or raises significant issues of policy or law that the Board failed to address adequately in the decision (see *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096).

9. The relevant subsections of section 128.1 provide:

> **128.1** (1) A trade union applying for certification as bargaining agent of the employees of an employer may elect to have its application dealt with under this section rather than under section 8.
>
> (2) The trade union shall give written notice of the election,
>
> (a) to the Board, on the date the trade union files the application; and
>
> (b) to the employer, on the date the trade union delivers a copy of the application to the employer.
>
> (3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice under subsection (2), the employer shall provide the Board with,
>
> (a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and
>
> (b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7 (14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.
>
> (4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),
>
> (a) the bargaining unit; and
>
> (b) the percentage of employees in the bargaining unit who are members of the trade union.
>
> (5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76

> has been contravened or that there has been fraud or misrepresentation, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.
>
> ...
>
> (13) If the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it may,
>
> (a) certify the trade union as the bargaining agent of the employees in the bargaining unit; or
>
> (b) direct that a representation vote be taken.

10. The Board in *Air Kool Ltd., supra,* exhaustively analyzed the provisions of section 128.1 in the context of other provisions in the Act regulating the certification process and concluded that:

> ...the legislature ... has constructed the provisions of section 128.1, to fit closely with the existing regime for vote based certifications. These provisions are heavily prescriptive and direct the Board's process in considerable detail.

11. In line with this approach, subsection 128.1(4) of the Act strictly prescribes the sources of the information necessary for the Board's determinations to be the applicant and the responding party and the Board in *Air Kool, supra,* interpreted the time limits of subsection 128.1(3) to have been mandatory in the context of the facts of that case. Therefore in this case the responding party cannot be heard to say that the evidence it now offers was not available to it or that there was no opportunity to offer this evidence since delivery was made to the responding party under the Rules of Procedure and subsection 128.1(3) of the Act offered that opportunity.

12. Notwithstanding section 128.1, subsections 7(12) and 7(13) of the Act continue to specify what information any applicant must provide in its application for certification, without exception or variance in the case of an election to have the application dealt with under section 128.1 of the Act. Subsection 7(12) requires an applicant union to provide an "estimate" of the number of employees of the responding party in the bargaining unit proposed and subsection 7(13) requires that it file evidence of membership (usually in the form of applications for membership).

13. Since written notice of the applicant's election under subsection 128.1(1) must be given at the same time as the filing of the application, there can be little doubt that the applicant's obligations under subsections 7(12) and (13) are the same for all applications for certification. It also is clear that subsection 128.1(5) operates as a safeguard, in the context of the strict provisions of section 128.1 of the Act, which allows the Board to consider information other than that which is supplied by these parties in the normal course.

14. Subsection 128.1(3) and section 8.1(in the case of a vote-based application for certification) are similar insofar as the information expected from the employer and the mandatory time limits that are operative (two days). The purpose of the information filed by the

responding party under each provision is also similar, i.e., to provide the Board with complete information upon which to make its routine assessment of the employment and membership status of those on behalf of whom the applicant has filed evidence and to consider whether there should be additional, or fewer or different, name(s) of those employees that the responding party asserts were working on the application filing date in the appropriate bargaining unit.

15. There is no provision in the Act similar to subsection 128.1(5) in section 8 that explicitly permits the Board to examine issues of misrepresentation nor indeed violations of the Act or fraud, although the Board has in *R-Theta*, [1998] OLRB Rep. Nov/Dec 1014 considered allegations of fraud with respect to the information the applicant had provided in its application. The issue in *R-Theta, supra*, arose under section 8 prior to the introduction of section 8.1 because the employer had no other statutory means of showing that the applicant had provided questionable information in its application to ensure that it showed the "appearance" of 40% level of membership evidence among the employees in the bargaining unit and thus obtain a representation vote. The introduction of section 8.1 of the Act provided the means by which the employer could, in the normal course, challenge whether the union's assertion of membership evidence of 40% or more among the employees in the bargaining unit was correct. It is significant that there is no decision of the Board cited dealing with the quality of the applicant's information with respect to the number of employees estimated to be the in bargaining unit. The context of the Board's analysis in *R-Theta, supra*, and the subsequent introduction of section 8.1 of the Act that to a large degree addressed the employer's arguments in that case, makes the findings in *R-Theta, supra*, of little value in the determination of this reconsideration.

16. If the number of status disputes raised by the information supplied by the responding party pursuant to subsection 128.1(3) forestalls the Board's final calculation of the number of employees in the bargaining unit for the purposes of subsection 128.1(4) (or for the purposes of determining the outcome of a representation vote under section 8), the Board's Rules of Procedure provide for a process by which the allegations supporting these disputes are disclosed and ultimately determined. Although many types of allegations are possible, one of the most common in applications under the construction industry provisions of the Act is that the disputed individuals were not performing the work of the bargaining unit for a majority of the application filing day, the test that the Board has generally applied for inclusion in a construction industry bargaining unit (see *Gilvesy Enterprises Inc.*, [1987] OLRB Re. Feb. 220).

17. Since the obligation under subsection 7(12) applies to all applicants, it makes no sense that misrepresentation could be established under subsection 128.1(5) simply upon showing a difference between the applicant's estimate of the number of employees and that asserted by PRW through these employee statements. Subsection 7(12) recognizes that the applicant's information with respect to the number of employees in its proposed bargaining unit need not be exact and it is precisely for this reason that the Act provides the employer, through subsection 128.1(3) (or section 8.1), with the opportunity to submit information that could be at variance with the applicant's, at least with respect to how many of its own employees were performing the work falling within the applicant's proposed bargaining on the application filing date.

18. Therefore we conclude that misrepresentation by an applicant with respect to information it provides pursuant to subsection 7(12) must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under subsection 128.1(3). If we were to conclude otherwise, applicants making an

election under 128.1 would be required to satisfy a stricter standard of accuracy in their "estimate" than applicants in applications for certification that are dealt with under section 8 of the Act and we are not convinced that there is any labour relations policy or reason that section 128.1(5) should produce this difference.

19. It is notable that PRW has not established any element of wrongdoing by the applicant through the statements filed. On their face the most that they establish is some degree of error or misunderstanding by the applicant that could have been addressed by PRW's information under section 128.1(3) of the Act. This is entirely different from the situation in *R-Theta, supra,* where the employer's only recourse was to challenge the applicant's information supporting the representation vote that led to certification through allegations of fraudulent misrepresentation. The responding party has established no grounds upon which the Board should exercise its powers of reconsideration under subsection 114(1) or its discretion under subsection 128.1(5) of the Act. These employees' statements are nothing more than an attempt to obtain the same result PRW lost by failing to provide information pursuant to subsection 128.1(3) of the Act. Furthermore, the membership cards in another union do not have any impact upon this application for certification because they do not, in and of themselves, contradict in any way the membership evidence filed by the applicant since it is possible for employees to be members of more than one union.

20. For all of these reasons, the request of PRW is rejected and the certificates issued are not revoked.

21. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

0048-05-ES Marc Barrette, Applicant v. **Rainbow Concrete Industries Ltd.** and Director of Employment Standards, Responding Parties

Employment Standards – Termination – This was an employee application under the *ESA, 2000* for review of a refusal to issue an Order to Pay termination and severance pay – After suffering a workplace injury, the employee did not work again for the responding party past February 28, 2003, although he continued to remain employed – On February 1, 2005, the responding party mailed him a pre-printed pension form replete with references to termination, both within the heading and throughout the various sections – The Board found that the most probable interpretation of the pension form was that the responding party unilaterally severed the applicant's employment consistent with the definition of "severance" under section 63(1)(a) – Whether or not it intended to sever the applicant's employment was immaterial – The Board also held that, in light of section 9(2)(b) of *O. Reg. 288/01*, the doctrine of frustration did not apply in this case to prevent the applicant's entitlement to severance – The onus was on the party raising the defence of frustration to demonstrate that the applicant's severance was not prohibited by the *Human Rights Code* – To succeed, the party was required to demonstrate that it had accommodated the applicant's injury to the point of undue hardship – This threshold had not been reached in this case – Since the applicant's severance pay entitlement comprised the monetary limit

set by section 103(4), the Board concluded that it was unnecessary to determine whether the applicant was also entitled to termination pay – Application granted

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Marc Barrette* appeared on behalf of himself; *Jack Braithwaite* and *Ethel Kingston* for Rainbow Concrete Industries Ltd; *Joe Ferraro* for the Director of Employment Standards.

DECISION OF THE BOARD; April 10, 2006

1. This is an employee application under the *Employment Standards Act, 2000* .S.O. 2000, c. 41 as amended ("the Act") for review of a refusal to issue an Order to Pay.

Background

2. The Employment Standards Officer determined that the claim by the applicant (or "Mr. Barrette") for termination pay and severance pay failed because he had not, in fact, been terminated by the responding party, Rainbow Concrete Industries Limited ("Rainbow" or "the company"). The company adopted this as its primary position, as did ultimately the Director of Employment Standards ("the Director"), in the hearing of this matter on February 1, 2006. The company and the Director consider Mr. Barrette to remain employed as an inactive employee. In the alternative, the company stated that the contract of employment had been frustrated, and Rainbow was therefore exempt from the obligation to provide termination pay and severance pay. The Director took issue with that alternative argument.

3. Mr. Barrette advanced only one position, that he had been terminated by Rainbow in February 2005 upon receiving in the mail a pension document which appears to have been partially completed and signed on February 1, 2005 by Rainbow's controller, Ethel Kingston. Among other things, the form indicated that Mr. Barrette's employment was terminated, and that the last day of his employment was February 28, 2003.

The Evidence

4. At the outset of the hearing, counsel for Rainbow orally stipulated a detailed statement of facts which neither the Director nor the applicant disputed. The essence of those stipulated facts are set out in paragraphs 5 through 12 below.

5. Mr. Barrette first commenced employment with Rainbow on March 5, 1990. He suffered a workplace injury on October 20, 2002. At the time he was a Crane Operator. As a result of his injury, he was placed in a modified work assignment as a security guard for Rainbow from December 24, 2002 until February 28, 2003, at which point the modified work was eliminated. Mr. Barrette did not work again for Rainbow after February 28, 2003, although he continued to remain employed.

6. The Workplace Safety and Insurance Board ("WSIB") issued an ergonomics report on July 7, 2003, which determined that the job demands of the Crane Operator position exceeded the applicant's medical precautions and could contribute to an aggravation of Mr. Barrette's back

injury. WSIB correspondence of August 28, 2003 confirmed that the applicant had reached his maximum medical recovery as of June 23, 2003, that no further significant change in his medical condition was expected, and that he would have a permanent impairment.

7. By letter dated September 5, 2003, a third party disability consultant advised WSIB that Rainbow could not accommodate the applicant's medical restrictions, and recommended that WSIB move forward by entering Mr. Barrette in a labour market re-entry program.

8. By letter dated November 10, 2003, Rainbow advised the applicant of two potentially available positions, and requested that he provide an updated resumé. Rainbow further advised Mr. Barrette that, as permitted by the *Workplace Safety and Insurance Act*, the company was ending his workplace benefit coverage following the one-year anniversary of his injury. The company also provided Mr. Barrette information about how he might convert his group benefit plan privileges into an individual life insurance policy.

9. Through correspondence dated October 25, 2004, WSIB advised the applicant he had been approved as of October 20, 2004 for entry into WSIB's labour market re-entry program to gain credentials as a pharmacy technician.

10. On or around February 1, 2005, Rainbow's Controller, Ethel Kingston signed, dated and sent by mail to the applicant a pre-printed pension form. It was accompanied by what appear to be general pre-printed written instructions headed, "YOUR PENSION PROGRAM AT RAINBOW CONCRETE INDUSTRIES LTD.". The instructions state:

> Enclosed is a Manulife "termination form" which must be completed and returned to us.
> Please call us directly to discuss your options regarding transferring your
> Rainbow Pension Plan to your personal retirement plan.
>
> We can be reached at:
>
> **Gary Choy – 675-8341, ext 247**
> **J. D. Lamont – 675-8341, ext 230**
>
> Thank you

11. The pre-printed form itself consists of two pages. The first page is relevant for purposes of this matter. It is attached as Appendix "A". I have blocked out the applicant's personal information pertaining to his residential address and telephone number.

12. By letter dated December 2, 2005, WSIB advised Mr. Barrette that, due to further deterioration of his back injury, he was no longer a suitable candidate for the Pharmacy Technician program.

13. The stipulated facts were supplemented by the testimony of Mr. Barrette and Ms. Kingston. In large measure, their testimony did not conflict. I identify the few material discrepancies below.

14. The organizational structure at Rainbow, a heavy-industry manufacturer, has the owner in the top echelon, followed by the owner's son, Rainbow's Vice-President. Under the Vice-President are two senior managers, Ms. Kingston and the Production Manager. Each has five to seven managers reporting to them.

15. Ms. Kingston has responsibility for payroll, accounts receivable, accounts payable, and financial reporting. She also is responsible for Rainbow's human resource function, although the managers at Rainbow make their own hiring and disciplinary decisions. Ms. Kingston participated in aspects of Mr. Barrette's post-injury rehabilitation period. She attended meetings involving the applicant and his WSIB representatives to review his progress and consider how he might be utilized in the workplace given his medical restrictions. She appears to have been the principal management representative in these interactions.

16. On October 25, 2003, Mr. Barrette noticed a Rainbow advertisement in the newspaper for a dispatcher position. Mr. Barrette expressed interest in the position to Rainbow. However, as Ms. Kingston testified, Rainbow decided not to go through with filling the advertised vacancy because of a winter downturn in business. The job was eventually filled in the fall of 2005, after Mr. Barrette filed his claim for termination and severance pay with the Ministry of Labour. In any event, Rainbow did not at any point offer the job to Mr. Barrette, or offer to train the applicant to become a dispatcher.

17. On December 17, 2004, Mr. Barrette contacted Rainbow by telephone. He had two concerns: his employment status with Rainbow and his pension. By this time, the applicant knew he was accepted into the Pharmacy Technician training program, and that the training would commence in a few weeks. His call was put through to Ms. Kingston.

18. For the most part, the testimony of the applicant and Ms. Kingston concerning this conversation are in harmony. They agree that the applicant raised his two concerns about his employment status with Rainbow, and his pension. With respect to his employment status, they agree that Mr. Barrette gave no indication to Ms. Kingston that he intended to terminate his employment. In fact, in the course of his cross-examination, the applicant testified that Ms. Kingston asked him if it was his intention to quit, and he made clear that it was not. What he wanted to know from Ms. Kingston was whether or not he had any chance of alternative work at Rainbow. She could not give him any assurances on that point, because there had been no change in circumstances. As far as she was concerned, the applicant remained an "inactive" employee, and she told him so. Ms. Kingston gave no indication that Rainbow was contemplating the possibility of terminating the applicant. Ms. Kingston did not, in the course of her testimony, contradict Mr. Barrette's evidence that he made it clear to her on December 17, 2004 that he had no intention of ending his employment with Rainbow. In fact, she felt the applicant was attempting to put her on the spot in terms of Rainbow's intentions in that regard. She refused to be drawn in on the issue.

19. The conversation turned to the issue of Mr. Barrette's pension. He wanted to know the status of his membership in the plan. Ms. Kingston told him he remained a member in the pension, that the contributions to the plan were 100% vested and essentially his assets. She further indicated to him that he could leave the contributed funds in the plan or transfer them out, and that, if he was thinking of "moving on" and transferring the funds out, he could do so through an investment advisor of his choice. Ms. Kingston testified in chief that, toward the end of the

conversation, she told Mr. Barrette to let her know what he wanted to do about his pension because she knew that, if he chose to transfer the pension funds, he would require a form signed by Ms. Kingston. In the course of his cross-examination by counsel for Rainbow, Mr. Barrette was adamant that Ms. Kingston did not ask him to get back to her. When Mr. Barrette cross-examined Ms. Kingston, he put to her that she had not raised the issue of a pension form during their conversation. Ms. Kingston thought she had, but conceded that the conversation was some time ago, and that she has had many similar discussions with employees about their pensions. She testified that it is her usual practice to inform employees that they require an appropriate form to effect any transfer of pension funds.

20. Mr. Barrette and Ms. Kingston had no further discussion after their telephone call of December 17, 2004. There was no evidence that Mr. Barrette called anyone at Rainbow after that date concerning any issue, including his pension.

21. The applicant entered the Pharmacy Technician training program in early January 2005. As indicated earlier, he was effectively removed from the program towards the end of 2005 when WSIB determined that his condition had deteriorated further.

22. The pension form, the first page of which is reproduced as Appendix A hereto, was signed by Ms. Kingston and sent out by mail to Mr. Barrette around the beginning of February 2005, some six weeks after their conversation. Ms. Kingston explained, without challenge, that the form sent to Mr. Barrette was one of many routinely issued by the company on an annual basis to all inactive employees who are also members in the pension. When assets in Rainbow's pension plan exceed $3 million, the company is statutorily required to conduct an audit of the plan, at its cost. It is in Rainbow's financial interest, therefore, if the pension assets are valued below the $3 million threshold. The company's hope in sending out the pension forms to the inactive employees is that enough of them will decide to transfer their vested funds out of the plan so that Rainbow will not have to incur the costs of an audit. In addition, the fewer people in the pension plan, the lower Rainbow's annual pension fund fees. Ms. Kingston said that Mr. Barrette was included in the mailing of the forms both because he was a member of the inactive group of Rainbow employees and because he had called her personally about the pension.

23. Ms. Kingston also explained the pre-conditions for a transfer of pension funds. Rainbow's pension plan is a defined contribution pension plan. Employees contribute a portion of wages to the pension, which is matched by the employer. The funds vest in the contributing employee after two years' membership in the plan. Members can take the funds out in four circumstances: when they reach normal retirement age (65), when they retire early (minimum age 55), when they are in receipt of long-term disability benefits (under certain additional conditions), and when employment is terminated. (The only other exception applies in cases where employees contribute more than their required share to the pension plan. Those extra contributions can be accessed by the employee at any time).

24. Mr. Barrette said that when he received and reviewed the form, he concluded that his employment with Rainbow had been finally terminated. He did not attempt to confirm that conclusion by calling anyone at Rainbow. He also did not complete or sign the form. He simply made a claim at the Ministry of Labour for termination and severance pay.

Analysis and Conclusions re Severance Pay

25. I begin with the issue of severance pay under the Act, because if Mr. Barrette is entitled to severance pay, there will be no need, for reasons which will become clear, to consider the issue of termination pay.

26. Part XV of the Act deals with termination and severance of employment. It defines severance of employment, and the conditions under which an employer must provide severance pay.

27. Subsection 63(1) defines severance in the following terms:

> **63.** (1) An employer severs the employment of an employee if,
>
> (a) the employer dismisses the employee or refuses to continue employing the employee;
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;
>
> (c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;
>
> (d) the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or
>
> (e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period.

The statute contemplates severance of employment as the unilateral initiative of the employer, which can take several forms. At the risk of over-simplification, employers are generally free under the Act to terminate or sever employment, and employees are entitled, under certain circumstances to severance pay. The right to severance pay depends, among other things, upon the employee's length of employment (minimum five years) and the size, financially speaking, of the employer (minimum payroll of $2.5 million): see section 64.

28. Part XV also stipulates that "prescribed employees" are not entitled to severance pay (subsection 64(3)). "Prescribed employees" are persons identified in *O. Reg. 288/01* passed pursuant to the Act. They are the exceptions to the rule. An employer may terminate or sever the employment of prescribed employees without having to give notice of termination, termination pay or severance pay.

29. In light of the statutory scheme described above, the first question that must be answered is whether or not Mr. Barrette's employment was severed. If it was not severed, he has no claim to severance pay. If his employment was severed, the next and final question is whether

or not the applicant was, at the time of the severance, a prescribed employee as described in *O. Reg. 288/01*. If he was, again there is no entitlement under the Act for severance pay. If he was not a prescribed employee, he has an entitlement.

30. Was Mr. Barrette's employment severed? In my view it was, for the reasons that follow.

31. To the extent, if any, that Ms. Kingston spoke to the applicant about the pension form on December 17, 2004, she did not go into any detail about its contents. She did not, for example, explain that the only way for Mr. Barrette to access his pension funds was by having his employment terminated. She simply indicated that he had the option of transferring the funds. She may have said further that he ought to think it over and call her back if he was considering such an option. But there was no evidence at all that Ms. Kingston warned Mr. Barrette, or that he knew from other sources, that the transfer option could only be exercised, in his circumstances, upon termination of employment. That is contextually critical to the Board's determination about the significance of issuing the partially completed pension form to Mr. Barrette. The covering letter did not explain that Rainbow was simply providing information to the applicant so that he might decide whether to take the necessary step of termination in order to access his pension funds. The instructions in the covering letter directed that the form, already check-marked "Termination of Employment" and signed and dated by a high ranking Rainbow manager, "must be completed and returned to us". It is true that the covering letter goes on to invite a phone call "to discuss your options regarding transferring your Rainbow Pension Plan to your personal retirement plan", but the inference is that something must be done with the pension funds because an event has taken place that requires action. In Mr. Barrette's circumstances, the only possible event was termination of employment, since he was not retiring and was not in receipt of long-term disability benefits.

32. The pension form itself is replete with references to termination, from the heading and throughout the various sections. Ms. Kingston ought to have been sensitive to how the applicant might react to that word given that, on December 17, 2004, when they had spoken, Mr. Barrette made it clear he was not voluntarily giving up his employment with Rainbow, and he seemed to be keenly interested whether Rainbow was contemplating his ongoing employment with the company. Ms. Kingston gave him no reason to think otherwise.

33. In my view, the most probable interpretation of the pension form and accompanying instructions, in light of the context in which it was generated, is that Rainbow unilaterally severed Mr. Barrette's employment by dismissing him or refusing to continue to employ him, whether it intended to do so or not. The applicant had no reason to expect receipt of a pension form, because though Ms. Kingston may have made reference to it six weeks earlier, she did not go into detail concerning its contents, and did not suggest she would be sending a form to the applicant. Nor did she say, even in general terms, that to access his pension funds, his employment would have to come to an end. On the other hand, Ms. Kingston was aware that Mr. Barrette had no intention of severing his relationship with Rainbow, and that he was curious whether the company had any such intention.

34. The company claims it did not intend to bring about end of the applicant's employment when it issued the pension form to him. Whether or not Rainbow intended such a result is, in my view, secondary at best, and in any event, the facts do not support a finding that

the company did not intend to sever Mr. Barrette's employment. Rainbow wanted to reduce the number of inactive members in the pension plan. The only way to achieve that end in Mr. Barrette's case was via termination of employment, and Mr. Barrette had made it clear he was not about to resign.

35. In summary:

- the company was motivated by financial considerations to reduce the number of inactive employees, including the applicant, from the pension plan by inducing them to remove all the plan contributions;
- the only means under the terms of the pension plan to remove the applicant as a pension plan member was by way of the termination of his employment, including his resignation;
- Ms. Kingston was well aware six weeks prior to issuing the pension forms that Mr. Barrette did not intend to quit his employment;
- no one from Rainbow advised Mr. Barrette that he would be receiving the pension form, or explained its import;
- the pension form that the applicant received had several references to termination, and the termination option was checked off;
- and there was no explanation accompanying the pension form that Mr. Barrette had the option of disregarding it, and continuing as a member of the pension plan, or for that matter, continuing his employment with the company.

Accordingly, I find that Rainbow's actions unequivocally constituted a severance of employment within the meaning of subsection 63(1) of the Act. Specifically, I find that Rainbow dismissed the applicant or otherwise refused, or was unable, to continue employing him when Ms. Kingston sent him the pension form around the beginning of February 2005.

36. I note that no party raised the possibility of the application of paragraph (c) of subsection 63(1) of the Act, which defines a severance in circumstances where an employer lays an employee off for 35 weeks or more in any period of 52 consecutive weeks. It will be recalled that following his injury in October 2002, Mr. Barrette was employed by Rainbow in a modified work assignment as a security guard until February 28, 2003 when the position was eliminated. The inference, of course, is that Rainbow eliminated the position, but there was no evidence about the circumstances or reasons for the company's decision. What is clear, however, is that Mr. Barrette did not work again for the company, though he remained an inactive employee until nearly two years after his brief security guard assignment. Whether or not the elimination of the modified work position and the ensuing period of inactive employment constituted a lay off within the meaning of paragraph (c) of subsection 63(1) of the Act, was not explored, and I therefore make no determination of that issue here.

37. I turn now to the second question. Was Mr. Barrette a prescribed employee, and therefore not entitled to severance pay?

38. There is only one possible exception applicable to Mr. Barrette's entitlement to severance pay, and that is through the application of paragraph 2 of subsection 9(1) and subsection 9(2) of *O. Reg 288/01*. Paragraph 2 of subsection 9(1) defines the prescribed employee as:

> 9. (1) 2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.

Subsection 9(2) provides the exceptions to the general rule articulated in subsection 9(1) 2. It states:

> 9. (2) Paragraph 2 of subsection (1) does not apply if,
> (a) the impossibility or frustration is the result of,
>
> (i) a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event,
>
> (ii) the employer's death, or
>
> (iii) the employee's death, if the employee received a notice of termination before his or her death; or
>
> (b) the impossibility or frustration is the result of an illness or injury suffered by the employee, and the *Human Rights Code* prohibits severing the employment.

39. Counsel for Rainbow argued frustration of the employment contract in the alternative to his main argument that there was no termination of employment, and argued further that the frustration which exempted the company from paying severance pay, occurred on the day Mr. Barrette injured himself, in October 2002. Counsel further argued that the frustrating event predated the Divisional Court's decision in *Ontario Nurses' Association v. Mount Sinai Hospital*, 69 O.R. (3d) 267 issued on January 19, 2004, and upheld by the Ontario Court of Appeal 75 O.R. (3d) 245 decision dated May 4, 2005. The Divisional Court ruled, and the Court of Appeal affirmed, that section 58(5)(c) of the *Employment Standards Act*, R.S.O. 1990, c. E.14 violated the *Charter of Rights and Freedoms*, and was therefore of no force or effect. Counsel for Rainbow submitted that, essentially, Rainbow was insulated from the decisions in *Mount Sinai* because the unconstitutionality of section 58(5)(c) was not determined when the frustrating event in this matter occurred, and that determination could not be applied retroactively.

40. I do not accept the reasoning behind this argument. An unconstitutional legislative provision cannot be constitutionally valid for a period of time until the defect is declared; if it is imperfect, it was always so. That notwithstanding, Rainbow's argument fails to take into account that the events in this case are not governed by the statute considered by the Courts in the *Mount Sinai* case. The Courts dealt with the constitutionality of subsection 58(5)(c) in the *Employment Standards Act*, R.S.O. 1990, c. E.14 (as opposed to the statute which applies in this proceeding: the *Employment Standards Act, 2000* .S.O. 2000, c. 41 as amended). Subsection 58(5)(c) exempted from the obligation to pay severance pay an employee absent because of illness or injury whose employment was impossible of performance or frustrated by the illness or injury.

There was no reference to the *Human Rights Code*, as there is in *O. Reg. 288/01* in both the termination and severance of employment sections cited above. Nevertheless, there is a compelling argument that the *ratio decidendi* in the *Mount Sinai* decisions does not apply to this case because, quite simply, the Courts were dealing with a different statutory, and ultimately unconstitutional, provision.

41. Still, the Courts in *Mount Sinai* expressed views, which are relevant in the matter before me, about the purpose of severance pay, an entitlement which has been prescribed in the Act and its predecessors since 1981. The Divisional Court took the view that severance pay "is an earned benefit that compensates long-serving employees for the past services and for their investment in the employer's business" (paragraph 19). The Divisional Court went on to observe that "[t]o deprive a person of a benefit of employment relating to their investment in the business for which they have worked, based on severe disability, goes to the very core of the values contemplated in s. 15(1) of the Charter". The Court of Appeal agreed that compensation for past service was at least one of the purposes of statutory severance pay, and it appeared to acknowledge the further possibility that severance pay was intended to ease the transition of terminated employees to other employment. It concluded that, in either case, disabled persons were unlawfully precluded by the statute, as it then stood, from reaping the benefits inherent in severance pay, whereas other employees were not. For that reason, the Court of Appeal upheld the Divisional Court decision striking down subsection 58(5)(c).

42. The clear message, in my view, from both Courts' reasoning in *Mount Sinai* is that any legislation which limits the availability of severance pay to disabled persons but not to persons without disability violates the *Charter's* equality protections in subsection 15(1), and the discriminatory impact probably cannot be demonstrably justified in a free and democratic society, pursuant to section 1 of the *Charter*. Of course, the constitutionality of the Act's and regulation's severance pay provisions was not an issue any of the parties pursued in the matter before me. One can only speculate whether the exception to severance pay articulated in the interplay between subsections 9(1)2 and 9(2) of *O. Reg. 288/01* would have survived constitutional scrutiny had Notice of Constitutional Question issued in this matter. For one thing seems clear: the effect of subsections 9(1)2 and 9(2) is to deny severance pay to severely disabled employees under certain circumstances. That would seem to fly in the face of the Courts' criticisms in *Mount Sinai*.

43. Be that as it may, I assume for purposes of this decision the constitutional validity of the statutory and regulatory provisions relevant to the issue of Mr. Barrette's entitlement to severance pay. Subsection 9(2)(b) of *O. Reg. 288/01* removes the doctrine of frustration if the frustration is the result of an illness or injury suffered by the employee *and* the *Human Rights Code* ("the Code") prohibits severing the employment. Rainbow's entire argument concerning frustration was that it was the result of an injury suffered by the applicant, and therefore I find that the first element of subsection 9(2)(b) comes into play, in favour of the applicant. The only question remaining to be answered is whether or not the Code prohibits severing the applicant's employment.

44. There can be no doubt that Mr. Barrette suffered from a disability within the meaning of the Code (see section 10(1)). Subsection 5(1) of the Code prohibits discrimination in employment on account of disability. But subsections 17(1) and (2) state:

> **17.** (1)..... A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.
> (2)....The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Under subsection 17(2) of the Code, Mr. Barrette could not be found to be incapable of performing the essential duties or requirements of his job unless, at the time of his termination, his needs could not be accommodated without undue hardship on Rainbow, considering the cost, potentially available outside sources of funding and any applicable health and safety requirements.

45. For the first two years following his injury in October 2002, there were some attempts to accommodate Mr. Barrette. For a few months, Mr. Barrette was permitted to work as a security guard, until that position was eliminated by the company. Despite the advice of the disability consultant to WSIB in September 2003 that Rainbow could not accommodate the applicant, the following November Rainbow notified the applicant about the possibility of his candidacy for two other jobs. For a brief while in the late fall of 2003, a dispatcher's position was vacant, and Rainbow considered, and then decided against, filling it then, for financial reasons. Although the applicant expressed interest in the dispatcher job, no consideration was given to the possibility of training Mr. Barrette to become a dispatcher, or to put him in a position to assume dispatcher duties when the job did come available later.

46. There was no evidence in this proceeding that the accommodation of Mr. Barrette's injury had reached the point of undue hardship to Rainbow, within the meaning of the Code. Indeed, when that evidentiary gap was noted in counsel for the Director's final argument, counsel for Rainbow in his reply submissions insisted that those issues were not properly the subject of a Board proceeding under the Act. However, subsection 9(2) of *O. Reg 288/01* places the applicability of the Code front and centre in frustration cases where the employee has suffered an illness or injury. As the party raising the defence of frustration, Rainbow failed to demonstrate that Mr. Barrette's severance from employment in February 2005 was not prohibited by the Code. Therefore, I find that he is not a prescribed employee.

47. For these reasons, the company's position that it is exempt from the obligation to pay the applicant severance pay cannot succeed.

48. The calculation of Mr. Barrette's severance pay entitlement is straightforward. There was no dispute that the applicant was earning $16.63 per hour as a Crane Operator just prior to his injury. Nor was there any dispute he regularly worked 44 hours per week. His regular weekly wage, therefore, was $731.72. When he was terminated in February 2005, he had been employed more than fourteen, but just fewer than fifteen years. The company's annual payroll exceeds $2.5 million. Therefore, when Rainbow terminated the applicant's employment without notice in February 2005, the applicant was entitled to 14.92 weeks' severance pay ($10,917.26). However, the Act limits an order to pay to $10,000: see subsection 103(4).

49. It is evident that, even if Mr. Barrette is entitled additionally to termination pay, the Board could not order it given the monetary limit set by subsection 103(4) of the Act. It is therefore unnecessary to determine that issue.

50. Pursuant to subsection 119(7) of the Act, I order Rainbow to pay the applicant $10,000 forthwith, and if that amount is not paid directly to him within 30 days of the date of this decision, then Rainbow is ordered to pay those monies, plus administrative costs of $1000, in trust to the Director of Employment Standards.

51. The application is granted.

1770-03-R International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 700, Applicant v. **Serco Canada Ltd. and/or Dock Products Canada Inc., SPX Canada Inc. and/or Edwards Door Systems Limited**, Responding Parties

Bargaining Rights – Sale of a Business – Related Employer – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *S.B.D. Wahl, E. Greenwell* and *M. Dugal* for the applicant; *Elizabeth Keenan, Steve Kalbfleish* and *Chris Plaunt* for Serco Canada Ltd. and/or Dock Products Canada Inc.; *Robert J. Cooper, Nell Jeffrey* and *Patrick Gannon* for SPX Canada Inc.; *Andrew Camman, Linda Rondinelli* and *Brian Crombeen* for Edwards Door Limited.

DECISION OF THE BOARD; March 3, 2006

1. This is an application made pursuant to section 69 and subsection 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act").

2. This decision involves a portion of the application, although probably the primary portion. Serco Canada Ltd. and Dock Products Canada Inc. ("Serco") (which may in fact be amalgamated corporations at this time) are an employer that, until March 14, 2003, was involved

in the construction industry and related service and maintenance business. It was and is bound to collective agreements with the applicant, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 700 (the "Ironworkers" or the "Union"). Edwards Door Systems Limited ("EDSL") is a corporation based in London and Sarnia to which it is alleged Serco transferred its business. Serco and Dock are corporations wholly owned by the American parent corporation.

3. That same corporation also owns SPX Canada Inc. There was almost no evidence about SPX Canada Inc. led at the hearing because the parties had agreed to hold in abeyance any claim of a relationship between Serco and SPX until after a decision had been made with reference to the relationship between Serco and EDSL. This decision therefore does not deal with any allegation of a relationship between Serco and SPX.

4. Briefly put, in March 2003, Serco closed down its installation and service work operation. The employees who performed the work of that operation were the ones covered by a collective agreement with the Ironworkers. As part of that shutdown, it entered into an "exclusive distributorship" arrangement with EDSL for the sale of its parts. The Ironworkers allege that the granting of this exclusive right to distribute the Serco product amounts to a sale of part of a business within the meaning of section 69 of the Act. What follows are the relevant facts.

Serco

5. Serco is a business that manufactures, and on occasion installs and services, loading docks, levellers, ramps, door seals, truck restraints and other forms of equipment related to loading systems in commercial and industrial buildings. In Canada it is based in Mississauga, to serve the Toronto region, Montreal, Edmonton, Vancouver and London.

6. The London facility supplied some of Serco's customers in Southwestern Ontario. There were certain customers who were described as "National Accounts". These are large multi-location operations such as the LCBO, Wal Mart, TNT Overland, and so forth. National Accounts were serviced from Toronto, regardless of their location in Ontario.

7. The London operation at one time contained both a manufacturing operation and an installation/service division. The installation/service division obtained work in Southwestern Ontario from businesses that were not National Accounts. This type of business consisted of bidding on installation work to general contractors who were engaged in the building of a new facility or a renovation to an existing facility. It also performed "service" work that could involve regular preventive maintenance, repair, or other forms of servicing of existing dock facilities. The manufacturing operation supplied most of the equipment that was installed by the installation/servicing department. Serco would also sell products it had manufactured to independent companies (other than direct competitors) who purchased parts for the purpose of fulfilling contracts they had with customers who might need or want Serco products.

8. Serco was bound to a collective agreement with the Ironworkers for persons described as "service technicians" in both London and Toronto. These service technicians were the persons who did both the installation and the repair or maintenance work. The details of the collective agreements are not relevant for the purposes of this decision.

Serco's Workforce before March 14, 2003

9. Serco had always had a Director of Canadian Sales based in London. In March 2003 this was Steven Kalbfleish. A Sales Manager for the London area reported to him. There were also eight to ten service installers employed at any one time.

10. In March of 2003, Mr. Randy McLay was the Sales Manager. He performed both a sales and estimating function. His bids were not generally subject to approval by Mr. Kalbfleish. He had commenced work in 1995 or 1996 as a service installer and had been promoted to the position of sales manager.

11. The installers were persons who were trained essentially on Serco product installation. They did not necessarily have any particular apprenticeship training or skills beyond those necessary for the performance of work for Serco.

12. Various witnesses gave different explanations of the division of work between new installations and the service or repair of existing installations. The ratio of installation to service work is not of significance for the purposes of this decision. One or another collective agreements applied to both types of activities and neither Serco nor EDSL ever seriously looked at performing only service or only installation of new facilities as a business. The two go hand in hand. However, it is fair to say that the installation of new Serco products on a new structure or an existing structure was a much larger part of the business than the service, maintenance and repair work.

13. Counsel for the Union argued that there was less profit in the installation work than in the servicing work. I cannot come to that conclusion based on the evidence, but it may well be possible. In any event, the business included both components.

Relations with the Ironworkers

14. For the reasons set out in a decision dated July 27, 2005, there is a distinct limit on the value of evidence given about a grievance between the Ironworkers and Serco. More will be said of this later.

15. At some point in early 2002, Ironworkers Local 721 (based in Toronto) and Ironworkers Local 700 (which has responsibility for the London area) discovered that Serco was operating in a manner that they considered to be contrary to the collective agreement. Some members of the workforce were members of the Ironworkers, many were not. In Toronto, a formal grievance was filed and settled by way of Minutes of Settlement. In London, no formal grievance was ever filed, but an arrangement was made similar to the Minutes of Settlement in Toronto. Essentially, the persons who were members of Serco's workforce were accepted into and became members of the Union and their terms and conditions of employment were governed by the collective agreement from that time forward.

16. For the reasons given in the July 27, 2005 decision, I declined to admit any evidence that might tend to show that EDSL had any knowledge or a role to play in that grievance settlement or the consequences arising from that settlement. In as much as the effect of the

settlement must have been to increase the costs of doing business for Serco, it reflects, but only incidentally, on the closure of the installation and service business in London.

Edwards Door Systems Limited

17. EDSL is a company controlled by two partners, Brian Crombeen and Philip Cassidy, operating out of London and Sarnia. It has been in existence for many years. Its business consists of the sale and servicing of docks, doors, hardware, specialty fire doors, folding doors, soundproof doors, grills, and other work related generally to doorways, loading docks and areas of ingress and egress from buildings. That is, before March 2003, EDSL performed all the same work that Serco did (albeit with different brand name products) but in addition sold, installed and serviced all types of doors and hardware. It has been in existence in different corporate forms since 1972. It bid to contractors for the installation of the products it carried, on either new buildings or renovations. It also sought service work consisting of either regular preventive maintenance, or periodic maintenance and repair. It was not and is not bound to a collective agreement with any trade union.

18. EDSL had carried the product lines of Serco and its competitors. It had done very little business with Serco prior to March 2003, consisting exclusively of the purchase of parts when a customer required the use of Serco parts on an existing dock that was to be serviced. The business of Serco did not include the door and specialty door business that EDSL pursued.

19. From Serco's perspective, according to Mr. Kalbfleish, EDSL was the one contractor in the London area that was not bound by an exclusive distributorship with any of Serco's competitors. Although EDSL did carry the products of Serco's competitors, such as Alpha Doors, Blue Giant, and NorDock, to service its customers who wished to acquire or needed to service the products of those companies, it did not have an exclusive relationship with any one of those manufacturers. Rather, it simply stocked their product when it needed to do so.

Closure of Serco

20. In the spring of 2002, Serco decided to close its manufacturing business and to supply all material from its primary manufacturing location in Texas. At that time, and up until just before March 14, 2003, Serco indicated that it wished to continue the installation and servicing work directly from the London location.

21. On March 14, 2003, Serco announced that it was closing its installation/service division effective immediately. Thereafter, Serco ceased to perform any installation of new work or servicing of existing facilities in the London area at all. This did not mean that Serco was vacating the market entirely. As Steven Kalbfleish, Director of Canadian Sales for Serco, put it: "We set up EDSL as the exclusive distributor of Serco brand products in the London area. All customers were advised that EDSL would be responsible for all of the sales and service of Serco's equipment, warranty claims, and management of existing accounts". By letter dated March 14, 2003 Serco directed all of its customers to contact EDSL at the phone number of that company. A telephone message from Serco's phone system referred all inquires to EDSL.

22. Mr. Kalbfleish testified that the decision was made in the United States and he was not privy to the reasoning behind the decision. He was advised only shortly before the service

technicians were advised of their layoff. At no time did Serco call any evidence with respect to the reasons for the closing of the operation. However, the decision was one that was made very quickly. Although Mr. Kalbfleish was not aware of when the decision was made, he was aware that Mr. Philip Killeen of the American parent contacted EDSL only 10 days before Serco closed its doors. Indeed the week before it closed, Serco sent a letter to its customers indicating it had plans to continue in business

23. The "exclusive distributorship" arrangement between Serco and EDSL was loosely defined, to say the least. There is no written contract. It may be discontinued without notice. The exclusivity is binding only on Dock. That is, Dock has agreed it will not enter into a relationship with any other installation contractor. It will sell its product to other installation contractors, but using a different pricing structure as discussed below. It will not sell to direct competitors, such as Alpha Doors and Blue Giant. EDSL, on the other hand, is free to carry the products of Alpha Doors, Blue Giant, or any other competitor. However, it is only with Serco that EDSL has a relationship whereby the manufacturer directs all of its potential and existing customers to EDSL, and is presumably the only installation contractor with whom it has its most favourable pricing arrangement.

24. Serco continues to maintain a facility in London. It sells its product to EDSL. It asserts that it has no other relationship with EDSL beyond selling it the product so that EDSL may use it to compete for work in the workplace.

Pricing Arrangements

25. Mr. Kalbfleish described the pricing structures of Serco's business in detail. For obvious reasons, I have not set out the precise figures involved. When Serco was in the business of installing and servicing Serco equipment, it had various pricing structures. Its sales force had a certain amount of discretion about what prices to bid to contractors involved in new construction or renovations, and to owners of existing equipment who were interested in repair or replacement parts. That price range was generally below the level at which Serco was prepared to sell its product to independent installing companies. That is, it always maintained a competitive advantage for its own installation and servicing division over other installing contractors with respect to the cost of parts and equipment. Mr. Kalbfleish, and possibly Mr. Randy McLay, had a further discretion with respect to a slight deduction from the lowest price that a sales representative could offer. That price was used as infrequently as Serco could manage while still retaining its ability to bid on projects in a highly competitive situation.

26. After Serco discontinued its installation business, it no longer had a pricing structure for its own operations. The price at which it supplies parts and equipment to EDSL is lower than the price at which it will supply parts and equipment to any other installation contractor. As indicated, Serco still refuses to supply to a direct competitor manufacturer.

The actions of employees after the closure of Serco

27. As indicated, Serco decided in March 2003 to discontinue the installation and service business. At no time did Serco call any evidence with respect to the reasons for the closing of the operation. Again, in the July 27, 2005 decision, I indicated that the matter was one which was

relevant to this proceeding, but was not one on which subsection 1(5) or section 69(13) required Serco to give evidence.

28. The decision to discontinue the installation/service business was communicated to employees very quickly. On Tuesday, March 14, 2003, they arrived at work. There was a meeting held at the front entrance way to the area where employees worked. They were advised that they were terminated immediately and asked to remove their personal possessions from the trucks and from the office. Mr. Chris Plaunt, from Serco, advised them that EDSL would be doing the installation and service work of Serco products from then on.

29. Mr. Randy McLay decided to look for other work immediately. He called EDSL, the company that had been mentioned at the meeting that morning. He met first with Mr. Crombeen. The interview lasted approximately one and a half hours. Mr. Crombeen called his partner in Sarnia, Mr. Cassidy, and asked if he would see Mr. McLay. Mr. Cassidy agreed and Mr. McLay drove to Sarnia and met with Mr. Cassidy.

30. Counsel for the Union argued that Mr. McLay had agreed that he heard Mr. Crombeen saying over the telephone to his partner something like "this is the guy we are waiting for". I cannot find any support in my notes or recollection for this assertion.

31. Although he was unable to remember precisely when a job offer was made, he did remember that by the time he was returning home from Sarnia, he knew he had a job.

32. Part of the Union's theory in this case was that employees were transferred to EDSL to continue the work of Serco. There was no evidence that Mr. McLay was directed in any fashion, or was motivated by anything other than a desire to replace the job that he had just lost. A number of the other employees of Serco sought employment with EDSL. Not all of them did; for instance, Steve Robinson, a senior installer, went to work for Alpha Doors. A number of them did work for EDSL, although the one employee called as a witness by the Union, Mr. Spencer Craig, worked for them only briefly.

33. Mr. Craig's evidence was that he went to EDSL, not because he was directed by anyone to do so, but because he was out of a job and needed work. Since he knew that EDSL was doing the service and installation of Serco products, that struck him as a logical place to apply. He quit shortly after being hired, as he realized that this was much the same sort of work (albeit on different products on the day or two he was working) and decided that he did not wish to continue the same kind of work.

34. There is no evidence that employees were directed by anyone to go to EDSL for a job in the sense that they were instructed to go there and that there were jobs waiting for them there. Employees were told on the morning of March 14, 2003 that the work they had done for Serco would now be performed by EDSL. Mr. McLay agreed that he had attended a local restaurant and bar on an evening when many of the former employees of Serco were in attendance with a representative of the Ironworkers. He agreed that he probably did tell them that they might look for work at EDSL because he knew they were hiring, and may have offered to set up interviews for them. He testified that he said there was no guarantee that any of them would be hired, simply that there was work available.

35. On the evidence, there were seven employees from Serco who obtained employment at EDSL. Some, like Mr. Craig, worked for exceedingly short periods of time. I have no evidence as to what percentage of EDSL's workforce those individuals represented at any one point in time.

Installation and Service of Serco Products by EDSL

36. As indicated, EDSL had long been in the business of bidding to contractors for the installation of new doors, docks and associated hardware, and the service, repair and maintenance of such installations. Mr. Crombeen testified that he hired former employees of Serco because he anticipated that EDSL would need more employees if he was picking up more work from Serco and that they had experience, both generally with the kind of work EDSL did, and specifically with the Serco product. It appears they did not require any extensive training. Indeed, even Mr. McLay was given very little training. The two courses he described were of the "ongoing training" sort, rather than any training to familiarize himself with the company or its products. He began selling not only Serco products, but also other products that EDSL installed in the same area to essentially the same market that he had been serving the week before.

37. There is no question that EDSL profited from its relationship with Dock. It performed a higher proportion of service work to contract work than had been the case for Serco, and the primary effect of the exclusive distributorship arrangement with Serco was that the volume of service work increased substantially. There was, however, some loss of market share to Serco that is inevitable with such transitions. In 2001, Serco's gross sales were $1,200,000 and in 2002 they were $906,000. The total for 2003 of both Serco and EDSL was $407,000. Overall, Mr. Crombeen said that the increase in gross sales was a fairly small amount for EDSL. He estimated that this increased business accounted for 5-10% of the working hours for his mechanics or installers, and that the total addition to his gross sales was less than 5% of the 2002 gross figures for the company. It did, however, represent a very large increase in the service business that EDSL performed.

38. While there is little evidence on the point, what evidence I have from Mr. Crombeen and the one employee who testified was that installers hired by EDSL after Serco terminated them were required immediately to perform work on other brands of dock equipment. That suggests that the skills needed to perform the job were generic to the industry rather than being specific to Serco and its organization.

Sale of a Business – Relevant Case Law

39. The theory of the Union's case rests on the assertion that the exclusive distributorship arrangement between Serco and EDSL constitutes a sale of a business. In the Union's submission, the fact that the work involved in the installation, repair and maintenance of Serco's products formerly performed by Serco is now being performed by EDSL constitutes a sale of a business. The work, and the expertise of Randy McLay, have been, in the Union's submission, transferred to EDSL and the Union's bargaining rights should follow them in accordance with section 69.

40. Such an analysis is a narrower focus than this Board has used in its analysis of applications under section 69. The Union relied on one decision by the Canada Labour Relations

Board (as it then was) in *Cafas Inc.* [1983] 50 DI 231. The Canada Board in that case focused very narrowly on the work being performed. It stated at page 10:

> 10. … In *Radio CJYQ Limited, supra*, we stated that essentially two conditions must be present before we can determine a sale of a business under section 144. First, there must be continuity in the work and activities carried out by the employees and, second, the business sold must be operated for the same purpose by the purchaser. Relying on factors that are specific to each case, we can determine whether there is continuity of activities and of purpose. …

41. While the type of work being performed is obviously of crucial importance in any sale of a business case, the Board has never focused exclusively on the work functions being performed. Section 69(1) & (2) provide as follows:

> **Sale of business**
>
> **69.** (1) In this section,
>
> "business" includes a part or parts thereof;
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.
>
> **Successor employer**
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

Section 69 directs the Board to determine if an employer … "sells … his or its business … to a third party". The section raises two issues: first, the sale or transfer (i.e. the transaction the applicant union says constitutes a sale) and the business (i.e. what, if anything, was transferred). The Board has generally not been overly concerned with the form of the transaction and has found an extremely wide variety of transactions might constitute a sale, depending on the facts. The real focus of the Board's analysis in most cases has been whether or not a "business" has been transferred. In examining whether what the alleged purchaser has received is a business or part of a business that the alleged vendor formerly ran, the Board looks at the work performed by employees, but not to the exclusion of other factors.

42. Given the variety of forms of commercial or institutional activity and the variety of ways in which that activity may change or be transferred, it is impossible to provide a single and straightforward definition. In the end, it is the factual analysis of each case that is determinative. However, in general terms, the Board has described a business in various ways.

43. In *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, the Board described a business this way:

> 30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on". A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. …

In *St. Leonard's Society of Metropolitan Toronto*, [1993] OLRB Rep. Jan. 56, the Board put it this way:

> The Board's conception of the "business" under the *Labour Relations Act* is an operational or instrumental one. The business is not its legal envelope, nor the employees, nor some incidental or unrelated grouping of assets, nor the body of work in which employees may be engaged from time to time. It is a delivery system, an economic vehicle, an organizational means of getting something done. It is to this vehicle that bargaining rights attach and in which they continue if the undertaking or a coherent part of it is transferred to a new owner.

44. Similarly, in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, the Board identified a large number of factors, any combination of which might be significant in deciding if there had been a sale of a business:

> In each case the decisive question is whether or not there is a continuation of the business … the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. *It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before.* …(emphasis added)

45. Finally, in *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. Apr. 281, the Board discussed its jurisprudence with respect to the sale of a business over a long period of time and summarized the results at paragraph 66 as follows:

> 66. In each of these cases, the Labour Relations Board found that the predecessor had transferred a coherent and severable "part" of its economic organization – managerial, or employee skills, plant, equipment, know-how, or goodwill – thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This "new" economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them were preserved. The "part" of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage.

46. That is not to say that work functions are not important, and indeed crucial to any sale of a business application. As the Board said in *Accomodex*, supra:

> 59. As might be expected in a labour relations statute, the Board pays particular attention to the "character" of the business (a matter referred to in section 64(5)) and the characteristics of the employer/employee relationship, because, from a labour relations point of view, the importance of the business is that it generates work opportunities for employees. The activities of the business require it to enter the labour market as an employer, and this, in turn, can give rise to the employment or collective bargaining relationships with which the Act is concerned, and which section 64 is designed to preserve. Accordingly, in determining whether there has been a "sale" within the meaning of the Act, the Board attaches particular significance to the nature of the work performed in, and by, the business, before and after the alleged transfer. If the nature of the work performed subsequent to the transfer is substantially similar to the work performed prior to that transaction (and if the employees, or types of employees, are the same) this would normally support an inference that there has been a transfer of a business or part of a business within the meaning of section 64. …

However, that is not to say that the work itself is determinative or primary in assessing whether or not there has been a sale of a business. In each of the cases cited by counsel for the Union, the Board has found a business is more than simply the work performed. In *Lincoln Hydro Electric Commission*, [1999] OLRB Rep. May/June 397, the Board found a sale in the acquisition of "a constellation of assets, tools, equipment, property interests and related elements which permit Lincoln Hydro to continue, without interruption, the same basic service to the same customers in the same location in much the same way as before". In *Automatic Fuels Limited Dependable Service*, [1972] OLRB Rep. May 515, the Board found that the complete business of the oil burner servicing work had been transferred to a successor company, not simply the work that employees had performed previously. Cases like *Senstar Corporation*, [1989] OLRB Rep. Nov. 1159 and *Accomodex*, supra, may turn on a very narrow set of elements that make up the core of the business. In *Accomodex*, it was really nothing more than a specific building and location. In *Senstar Corporation*, supra, the patents and certain technical expertise were found to be the essence of the commercial activity, and none of the other assets or other attributes of the business were significant. Similarly, in *Briston Fashions Inc.*, the entire business was transferred as a functional entity, and indeed the expertise of the former owner of the predecessor remained available for design and other work.

47. The only decision that does not fit into this pattern is the *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467. That is a case which, at first glance, appears to be

contrary to the analysis in *Metropolitan Parking*, supra. It is a case that is seldom relied on in subsequent decisions of the Board. However, even in that case the Board relied at paragraph 17 on the transfer of the predecessor's management and organization, as well as the employees. It found that in the context of an operation described as "largely managerial and organizational in nature, the transfer of the work and the expertise to manage that work constituted a sale". I do not mean to overstate this fact; however, the case is one, which is at variance with the preponderance of other analyses of section 69.

Analysis of the Facts of this Case

48. In this case, there are two ways of characterizing what Serco did. The responding parties argue that Serco simply got out of the business of installing and servicing its own equipment while instituting what it hoped would be an advantageous arrangement that would continue to enable it to supply its product to the Southwestern Ontario market (other than "National Accounts"). The Union asserts that Serco transferred the work of installing and servicing its equipment to EDSL for no consideration other than an agreement to carry the Serco line of products along with those of its competitors.

49. This analysis is not assisted by Serco's refusal to explain the reasons for its decision. There are many cases where the consideration for a transfer is not financial and is entirely in response to non-monetary considerations (family loyalties, a sense of obligation to long-term employees, etc.). There is no suggestion that any such considerations existed that might have motivated Serco. One could speculate about what was more and less profitable for Serco to do, but in the absence of any evidence from those in a position to give it, I am not inclined to make any such finding. It is sufficient to say that the process appears to be one that is within the range of normal commercial transactions, and there is no basis in the evidence for concluding that it was anything but a business decision.

50. No doubt the settlement of the grievance with the Union, including the probable increased wage burden on the business, was part of that business decision. However, motivation is relevant in a sale of business application only to the extent that it may inform the Board's analysis of the facts. The fact that business costs have increased may cause an employer to shed part of its business. The question is how it does so, and whether that action involves the transfer of a business.

51. The Union's case rests on the fact that work formerly done by Serco is now being done by EDSL. Even if one were to characterize it as a transfer, it could not be called the transfer of a business. No assets were transferred; the London office, trucks, tools and shipping facility still remain with Serco; no ongoing contracts or business relationships were transferred; no organizational or managerial expertise was transferred.

52. Employees were not transferred. Some of them took up job opportunities at EDSL, but on the evidence that I have, that represents nothing more than people who have lost their jobs looking for work in the most likely place to find it. Spencer Craig said he worked on equipment other than Serco-brand equipment during his brief time at EDSL. That suggests that his skills were not unique to Serco products, but were of a generic nature that would be useful to any employer in this business. Another employee, Mr. Robinson, went to work for one of Serco's major competitors, suggesting that the skills were eminently transferable. Thus, there was no

transfer of a coherent workforce with specialized knowledge of Serco products that was essential to the installation and service business.

53. Randy McLay obtained work in a similar way. As a sales representative for Serco, he was clearly an important person in the success or failure of the organization. That does not mean that he was a "key person" in Serco in a sense that that term is used in Board decisions. He did not represent in and of himself a particular part of the business. He possessed no expertise or ownership that would identify him with the business in any sort of exclusive way. What he brought to EDSL was his skill as a sales representative, a knowledge of the business and a knowledge of the territory. He began to sell Serco and competitive brands (although Serco may have been the more attractive product for EDSL for financial reasons). His ability to take on these expanded tasks indicates that he is a skilled sales representative, not a key organizational component of Serco's business.

54. Finally, the Union argued that on its view of the evidence, the installation of equipment generated minimal profits, and only the service work generated significant profitable revenue. If one accepts that proposition (which on the evidence I have some difficulty with), then Serco simply abandoned the major portion of its work. It receives no benefit from the fact that EDSL performs any service work on existing facilities (except for the profit that will arise from the sale of replacement parts). Serco transferred no existing contracts or warranties; those liabilities remain those of Serco. Even if EDSL winds up doing the warranty work, that is simply a cost to Serco. So long as any service company is performing work on Serco products using Serco parts, Serco will obtain the profit generated from the sale of those parts, although the exclusive distributorship arrangement is presumably intended to increase the likelihood of such parts being used and sold through EDSL. However, the evidence leads only to the conclusion that Serco decided to get out of the service business for reasons not explained. I cannot conclude that the cessation to do the service work, on the facts of this case, was a sale or transfer of a business within the meaning of section 69.

55. There is therefore nothing that could be identified as a business that EDSL obtained from Serco, nothing that could be described as an "economic vehicle", "an organizational means of getting something done" or a "definable part of the economic functions formerly performed by" Serco. Accordingly, the application under section 69 is dismissed.

Related Employer Application

56. The application under subsection 1(4) was not argued forcefully by the Union. Counsel argued that the "exclusive distributorship arrangement" between EDSL and Serco constituted both the instrument of common control, and the associated or related businesses or activities necessary for a declaration under subsection 1(4). Certainly, the Board has found that an employer in the construction industry carrying on the same business and same work functions as another related employer is carrying on associated or related businesses or activities. That analysis is usually dependent on the essentially disposable nature of corporations in the construction industry, the limited assets held by a construction company, and the real economic vehicle being found in the contacts expertise and acumen of the persons in charge of the businesses. None of those facts are present here.

57. In any case, the exclusive distributorship cannot be seen as an instrument of control. EDSL is not obliged to do anything. It has an incentive to sell Serco products, and certainly has an incentive to service any products, including Serco products, that it sells. However, what it does with that incentive, what priority it places in its own business strategy is determined entirely by EDSL. Serco has nothing to say about it. Similarly Serco is not controlled by EDSL. If it does not like how the arrangement is working out it can terminate the relationship at any time. I find therefore that there is no common control and direction in this case, and therefore the application under subsection 1(4) must also be dismissed.

Conclusion

58. The applications under subsection 1(4) and section 69 are dismissed to the extent set out in paragraph 3 above.

0276-05-U Mark Wilson, Applicant v. National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada) & its Local 222, Responding Party v. A.G. Simpson Automotive Systems, Intervenor

Duty of Fair Representation – Reconsideration – The union and employer sought reconsideration of a Board decision ordering that the applicant's grievance proceed to arbitration – Both the union and the employer stated they had not received notice of the consultation that gave rise to the decision – The parties submitted that the grievance had been taken to arbitration – The Board held that it was not necessary for it to determine whether or not the notice of consultation had been received by the union or the employer: if it was not, the Board's earlier decision would have to be set aside; if it was, the Board was satisfied that the union and employer had previously demonstrated an intention to participate in the proceeding; their failure to attend was inadvertent; the applicant cannot be prejudiced because his matter proceeded to arbitration – Reconsideration granted

BEFORE: *Ian Anderson*, Vice-Chair.

DECISION OF THE BOARD; March 14, 2006

1. This is an application for reconsideration of the Board's decision dated August 25, 2005 brought by the responding party union, and supported by the intervenor employer.

2. The applicant, Mark Wilson, filed a duty of fair representation complaint with the Board on April 22, 2005. The application seeks an order directing the union to proceed to arbitration with a grievance relating to Mr. Wilson's discharge.

3. The union and the employer both filed responses and appear to have participated in a meeting with the labour relations officer assigned to the file. Neither the union nor the employer, however, attended the consultation which took place on August 23, 2005.

4. Based on the uncontradicted representations of Mr. Wilson at the August 23, 2005, consultation, the Board issued the decision dated August 25, 2005, which found the union in breach of its duty of fair representation and directed it to proceed to arbitration.

5. The union and the intervenor employer both state that they did not receive notice of the consultation which took place on August 23, 2005, and which gave rise to the Board's decision of August 25, 2005. On this basis they seek reconsideration of the Board's August 25, 2005 decision.

6. There is no dispute that since August 23, 2005, the union has in fact proceeded to arbitration. One day of arbitration was held on January 12, 2006, and a further day is set for March 22, 2006. Further, both the employer and the union agreed that a decision by the Board to reconsider the August 25, 2005, decision would have no effect on whether or not the arbitration proceeds.

7. From the Board's file, notice of the consultation appears to have been sent to representatives of the union and the employer by the Registrar of the Board on June 22, 2005, by facsimile transmission. All parties are in agreement that the facsimile numbers used were the correct numbers for the representative of the employer and at least one representative of the union. The Board's files contain a confirmation of transmission report from its facsimile machine indicating that the status of both transmissions was "OK".

8. The union and the employer have provided particulars of processes each has in place to ensure that when facsimile transmissions are received they are brought to the attention of the intended recipient. The applicant, Mark Wilson, has not challenged the accuracy of these particulars.

9. Following receipt of the Board's decision of August 25, 2005, the union and the employer each state that they undertook an investigation to determine whether the notice of consultation had in fact been received. They were unable to find any evidence that the facsimile transmissions were received. On this basis they urge the Board to conclude that there is a problem with its facsimile transmissions with the result that neither the union nor the employer received the notice of consultation.

10. Mr. Wilson has not challenged the accuracy of the particulars of the investigations conducted by the union and the employer. He relies upon the Board's confirmation of transmission report as proof of the fact that the union and the employer received the notice of the consultation.

11. The Board does not find it necessary to determine whether or not the notice of consultation was received by the union or the employer. If it was not received, clearly the Board's August 25, 2005, decision must be set aside. Assuming it was received, the Board is satisfied that: the union and the employer had previously demonstrated an intention to participate in the proceedings; their failure to attend the consultation was inadvertent; and Mr. Wilson cannot be prejudiced by reconsideration of the Board's August 25, 2005, decision, since the union has in any event proceeded to arbitration, which was the remedy ordered by the Board.

12. The Board's decision of August 25, 2005, is, accordingly, hereby rescinded.

13. As to the merits of the complaint that was before the Board on August 23, 2005, given that the union has proceeded to arbitration, there would no longer appear to be any labour relations purpose served by inquiring further into the matter. Mr. Wilson, however, shall have until March 27, 2006 to file any submissions he may have as to why the Board should not terminate this application. If Mr. Wilson does not file any submissions, his application will be terminated. If Mr. Wilson does file submissions, the Board may nonetheless terminate his application, without conducting a further consultation, following consideration of those submissions. The union and the employer are not required to file responses to any submissions filed by Mr. Wilson until and unless directed to do so by the Board.

COURT PROCEEDINGS

3552-00-U; 0933-01-U; 1273-01-U (Court File No. 04/178) **Grantley Howell,** Applicant v. United Steelworkers of America, Local 7135 and OLRB, Respondents

Duty of Fair Representation – Judicial Review – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

Board decision reported at [2004] OLRB Rep. November/December 1092.

Superior Court of Justice (Divisional Court), Killeen J., J. DeP. Wright J., Sproat J., March 20, 2006.

THE COURT

[1] We are satisfied that the appropriate standard of review is patent unreasonableness. Decisions of the Board are protected by a strongly worded privative clause. The Board has particular expertise in labour relations matters.

[2] The *Labour Relations Act* is concerned with a balancing of the interests of various groups and the expeditious resolution of workplace disputes. The particular issues before the Board, being whether the Union fairly represented Mr. Howell in relation to his grievances and whether the Union took reprisals against him, are primarily factual.

[3] Mr. Howell presented his arguments in a clear and detailed manner. We examined the Record in detail and heard Mr. Howell at length.

[4] As to Board file 0672-04-U, the Board found that Mr. Howell was removed from Union office by a vote held in accordance with the Union by-laws and constitution. As Vice-Chair Sargeant stated, "To be voted out of office for legitimate concerns can hardly be considered a penalty".

[5] As to Board file 3552-00-U, a policy grievance respecting searches was pending and Mr. Howell disregarded the reasonable direction of the Union that members should submit to searches pending a decision at arbitration or other resolution. The Board analyzed the facts carefully and concluded that the Union acted reasonably in withdrawing Mr. Howell's individual grievances. The Board also found that the allegation that Mr. Howell was "singled out" for searches was not brought to the attention of the Union prior to withdrawal of the grievances.

[6] As to Board file 0933-01-U, concerned with the Union's decision to withdraw the grievance claiming disability benefits for Mr. Howell, the Board concluded the withdrawal was reasonable in that the Union sought medical evidence to support the claim. Mr. Howell failed to provide any evidence and instructed his doctor to not provide information to the Union.

[7] As to Board file 1273-01-U, respecting a grievance on behalf of Mr. Howell relating to discipline imposed for shoddy work, the Board indicates that Mr. Howell at the Consultation admitted performing the weld but took the position that it was not defective. Mr. Howell's position was that he had made two distinct welds in close proximity such that slag does not compromise the weld strength as opposed to a multiplayer weld which would be compromised by slag. Mr. Howell also conceded that the photographic evidence did not clearly show two distinct welds. The Board found that the issue, "is not whether the Union correctly concluded the grievance would not succeed, but whether the Union took account of all the circumstances and then reached a decision that was not unreasonable in the circumstances". The Board concluded that the Union did not breach its S.74 duty of fair representation.

[8] While the test for review is patent unreasonableness, we find that the Board decisions are correct for the reasons stated by the Board. This application for judicial review is, therefore, dismissed.

[9] The parties made submissions as to costs. The Union seeks costs of $4,000 and points out that by letter dated December 19, 2005 it warned Mr. Howell it would be seeking costs which could exceed $4,000. That letter also made the points that Mr. Howell has filed at least six complaints against the Union at the Board, and one at the Human Rights commission, all of which have been dismissed. The letter also referred to a prior judicial review application to the Divisional Court heard February 2, 2004 in which the Applicant was ordered to pay $2,000 to the Union.

[10] Any costs not paid by Mr. Howell fall on the shoulders of his fellow Union members. The Union's actual costs on this application undoubtedly far exceed $4,000. The position of the Union is reasonable and we fix costs in the amount of $4,000 payable by the Applicant within 30 days.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 2006

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1519-05-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. 830399 Ontario Inc. operating as V.I.P. Construction & Engineering (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry in the Regional-Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell (Ontario Labour Relations Board Area 15) and in the geographic townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville (Ontario Labour Relations Board Area 30), save and except non-working foremen and persons above the rank of non-working foreman.

2306-05-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. JV Mechanical Limited (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of JV Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of JV Mechanical Limited in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland; the County of Simcoe and the District Municipality of Muskoka; the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2448-05-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Everbrite Industries Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Everbrite Industries Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Everbrite Industries Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the County of Peterborough, the County of Victoria and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) *(Clarity Note)*

3425-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Boretta Construction 2002 Ltd. (Respondent)

Unit: "all construction labourers in the employ of Boretta Construction 2002 Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Boretta Construction 2002 Ltd. in all sectors of the construction industry in District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3627-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. PRW Excavating Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of PRW Excavating Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of PRW Excavating Contractors Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3742-05-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Westwood Drywall Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Westwood Drywall Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of Westwood Drywall Inc., in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Clarity Note)*

Bargaining Agents Certified Subsequent to Vote

2952-98-R: Brick and Allied Craft Union of Canada (Applicant) v. Vesuvius Canada Refractories Inc. (Respondent) v. International Union of Bricklayers and Allied Craftworkers, Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Interveners)

Unit: "all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Vesuvius Canada Refractories Inc. in the Regional Municipality of Hamilton-Wentworth, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on	1

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4129-03-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Casimiro Araujo o/a Cervanis Enterprise (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener)

Unit: "all employees of the Employer, including carpenters and framers and their respective learners and improvers, construction labourers, equipment operators and forklift drivers and pieceworkers, engaged in the construction of all phases of housing including the preparation of footings, the fabrication, renovation, alteration, erection and finishing thereof, exterior trim and similar work, save and except those persons above the rank of foreman and office, clerical and engineering staff, while working in and out of the following Geographic Areas of the Ontario Labour Relations Board Area Numbers 8, 9, 10, 11, 12, 18, 29, and 30" (11 employees in unit)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	0

2679-04-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Greenvilla Development Group Inc. (Respondent)

Unit: "all construction labourers in the employ of Greenvilla Development Group Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2656-05-R: Teamsters Local Union No. 419 (Applicant) v. Canarm Ltd. (Respondent)

Unit: "all of the employees of Canarm Ltd. working in the City of Toronto, Province of Ontario, save and except Site Manager, those above the rank of Site Manager, Office and Sales Staff" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	3

3011-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Trax Personnel Services Inc. (Respondent)

Unit: "all employees of Trax Personnel Services Inc. in the City of Cambridge, save and except supervisors and those above the rank of supervisor" (18 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	9

3012-05-R: Service Employees International Union, Local 1.on (Applicant) v. Mount Sinai Hospital (Respondent) *(Having regard to the agreement of the parties.)*

Unit: "all clerical employees regularly employed for not more than twenty four (24) hours per week, and all casual clerical employees, employed by Mount Sinai Hospital in the City of Toronto, save and except supervisors; persons above the rank of supervisor; secretaries to the following: President, Vice-Presidents, Directors, Assistant Directors, Department Managers, Budget Accountant, and Payroll Manager; secretaries employed for physicians, the Hospital Foundation, Hospital Auxiliary, and the Mount Sinai Research Institute; geographic secretaries; assistant supervisors in Central Service; office managers; buyers; medical photographers; systems analysts; ledger keepers; accountants; patient representatives; professional medical staff; persons employed in the Human Resources Department in a confidential capacity relating to labour relations; students employed during the university or school vacation periods; students employed in a co-operative training programme; students employed as medical dicta trainees; and all persons covered by subsisting collective agreements or certificates" (100 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	151

Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	50
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	3

3151-05-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1642511 Ontario Inc. c.o.b. GTA Forming (a registered business style) and/or, Sekhavati Gholamreza and Jamie Lane o/a GTA Forming (a registered business style) (Respondents) v. Trevor Squire (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of 1642511 Ontario Inc. c.o.b. GTA Forming (a registered business style) and/or Sekhavati Gholamreza and Jamie Lane o/a GTA Forming (a registered business style) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of 1642511 Ontario Inc. c.o.b. GTA Forming (a registered business style) and/or Sekhavati Gholamreza and Jamie Lane o/a GTA Forming (a registered business style) in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3412-05-R: National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada) (Applicant) v. CanGro Foods Inc. (Respondent)

Unit: "all employees of CanGro Foods Inc. in the Town of Dresden, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and security staff, nurses, and those covered under any current collective agreement" (4 employees in unit) *(Having regard to the agreement of the parties.)*

3419-05-R: Service Employees International Union, Local 1.on (Applicant) v. Sodexho MS Canada Limited (Respondent)

Unit: "all employees of Sodexho MS Canada Limited employed at Extendicare Halton Hills located at 9 Lindsay Court in the Town of Georgetown, save and except senior supervisors, office staff, clerical staff, dietician, student dietician, and persons above the rank of senior supervisor" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3458-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hertz Canada Limited (Respondent)

Unit: "all Terminal Trippers employed by Hertz Canada Limited at 2 Convair Drive East in Etobicoke, Ontario save and except Supervisors, those above the rank of Supervisor, Regular Trippers, Regular Airport Terminal Trippers and Office and Clerical Staff" (43 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3468-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Norfoam Ltd. (Respondent)

Unit: "all employees of Norfoam Ltd. at Northam Ind. Park in town of Cobourg, Ontario, save and except Supervisors, all those above the rank of Supervisor, and Office and Clerical employees" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	1

3478-05-R: United Food & Commercial Workers, Local 206 (Applicant) v. 1477879 ON Inc. o/a Trojan Security and Investigation Services Ltd. (Respondent)

Unit: "all employees of 1477879 ON Inc. o/a Trojan Security & Investigation Services Ltd. employed as security guards and alarm response security guards at 55 York Boulevard, Hamilton, Ontario, save and except persons covered by a current certificate issued by the Ontario Labour Relations Board to a bargaining agent other than the Union or other Collective Agreement, patrol supervisors, persons above the rank of patrol supervisor, client service representatives, sales staff, managers, dispatcher, central station operators, secretarial staff, clerical and office staff, casual employees and persons who are licensed under the Private Investigation and Security Guard Act, R.S.O. 1990 and employed as private investigators" (9 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names	8

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3485-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Coverall Tarping Systems Limited (Respondent)

Unit: "all employees of Coverall Tarping Systems Limited in the District of Thunder Bay, save and except supervisors and persons above the rank of supervisor" (2 employees in unit)

Number of names of persons on revised voter's list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3514-05-R: Construction Workers Local 52, affiliated with the Christian Labour Association of Canada (Applicant) v. Wabi Development Corporation (Respondent)

Unit: "all employees of Wabi Development Corporation in the Province of Ontario in the City of Temiskaming Shores, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and employees in the construction sector" (85 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	66
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	58
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	63
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

3531-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited engaged in cleaning and maintenance employed at TD Canada Trust, 745 York St. in the City of London, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3553-05-R: Ontario Public Service Employees Union (Applicant) v. Palin Foundation c.o.b. Oakham House (Respondent)

Unit: "all employees of Palin Foundation c.o.b. Oakham House, in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (68 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	90
Number of persons who cast ballots	66
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	65
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	0

3585-05-R: The Communications, Energy and Paperworkers Union of Canada (Applicant) v. CHEP Canada Inc. (Respondent)

Unit: "all employees of CHEP Canada Inc. in the City of Mississauga, save and except Assistant Warehouse Supervisor, those above the rank of Assistant Warehouse Supervisor, Office, Clerical and Sales Staff" (109 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	107
Number of persons who cast ballots	80
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	78
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3612-05-R: Service Employees International Union, Local 1.on (Applicant) v. Heutinck Nursing Home Ltd. (Respondent)

Unit: "All Registered Practical Nurses employed at Heutinck Nursing Home Ltd. (Hilltop Manor) in Cambridge, Ontario" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3647-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Lewisfoods Inc. (Respondent)

Unit: "all employees of Lewisfoods Inc. at 867 Lakeshore Road in the City of Burlington, Ontario, save and except Manager and all those above the rank of Manager" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

2778-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Fernbrook Homes Limited (Respondent) v. Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, Local 1030 (Intervener)

Applications for Certification Dismissed Subsequent to Vote

0549-03-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Applicant) v. Patrick Mechanical Limited (Respondent)

Unit: "all plumbers and plumbers' apprentices and all steamfitters and steamfitters' apprentices in the employ of Patrick Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices and all steamfitters and steamfitters' apprentices in the employ of Patrick Mechanical Limited in all other sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

4207-03-R: Labourers' International Union of North America, Local 506 (Applicant) v. TriAxis Construction Limited (Respondent)

Unit: "all construction labourers in the employ of Triaxis Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Triaxis Construction Ltd. in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

3505-04-R: Teamsters, Local Union No. 419 (Applicant) v. Prologix Distribution Services (Respondent)

Unit: "all employees of Prologix employed at 120 Sinnott Road, Scarborough save and except foremen, supervisors, persons above the rank of foremen or supervisor, office and clerical staff, garage mechanics, facility maintenance employees, employees engaged in the manufacture and/or installation of fixtures and persons covered by a subsisting collective agreement." (105 employees in unit)

Number of names of persons on revised voters' list	117
Number of persons who cast ballots	117
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	107
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	59
Number of ballots segregated and not counted	0

0341-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Norjohn Contracting and Paving Limited (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Norjohn Contracting and Paving Limited in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	4

1188-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Centennial Construction and Contracting (Niagara) Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Centennial Construction and Contracting (Niagara) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Centennial Construction and Contracting (Niagara) Inc. in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

2296-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Canada Pallet Corp. (Respondent)

Unit: "all employees of Canada Pallet Corp., at 755 Division Street in Cobourg, Ontario and 11 Moira Street, Marmora, Ontario, save and except supervisors, all those above the rank of supervisor, and office and clerical staff and security guards." (103 employees in unit)

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	109
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	88
Number of segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	64
Number of ballots segregated and not counted	21

2547-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Trentway Wagar Inc. and, The Corporation of the Town of Whitby (Respondents)

Unit: "all employees of the employer at Whitby, Ontario, working under contract for the Town of Whitby, employed as a full time and part time line run bus drivers, excluding persons classified as manager, dispatcher, school bus, and charter drivers" (49 employees in unit)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	43
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

2749-05-R: Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. Amsterdam Products Ltd. (Respondent)

Unit: "all employees of Amsterdam Products Ltd. in Cornwall, Ontario, save and except supervisors and persons above the rank of supervisor" (85 employees in unit)

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	87
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	56
Number of ballots segregated and not counted	4

3059-05-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Tilton Industries Inc. (Respondent)

Unit: "all employees of Tilton Industries Inc. in the City of Brampton located in Peel Region, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (55 employees in unit)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	59

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	5

3360-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Fresh Mix Ltd. (Respondent)

Unit 1: "all employees of Fresh Mix Ltd. in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (46 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	0

3418-05-R: Service Employees International Union, Local 1.on (Applicant) v. Extendicare Canada Inc. (Respondent)

Unit: "all clerical employees employed by Extendicare Canada Inc. or Extendicare (Canada) Inc., in the Municipality of Port Hope, Ontario in the County of Northumberland, save and except Managers, persons above the rank of Manager, and any employees represented by a trade union as of January 13, 2006." (5 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3466-05-R: National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada) (Applicant) v. Waste Management of Canada Corporation (Respondent)

Unit: "all employees of Waste Management of Canada Inc. working in or out of the Town of Mount Forest, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, dispatchers and employees covered by subsisting collective agreements" (42 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	0

3534-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1307742 Ontario Inc. o/a Ramada Limited (Respondent)

Unit: "all employees of 1307740 Ontario LTD O-A Ramada Express in the City of Windsor, Ontario, save and except employees who are regularly scheduled less than twenty-four hours per week, Managers and all those above the rank of Manager" (9 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	2

3535-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1339510 Ontario Inc. o/a Howard Johnson Express Inn (Respondent)

Unit: "all employees of 1339510 ONT INC. O-A Howard Johnson in the City of Windsor, Ontario, save and except employees who are regularly scheduled less than twenty-four hours per week, Managers and all those above the rank of Manager." (5 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

2048-01-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Robinson-Adams Overhead Doors Inc. (Respondent)

2122-01-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Westwood Garage Doors Ltd. and/or Westwood Overhead Doors Ltd. (Respondent)

0618-03-R: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Tristar Interior Contractors Ltd. (Respondent)

0459-04-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Quality Trim Home Inc. (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

1502-04-R: Labourers' International Union of North America, Local 493 (Applicant) v. Gorf Contracting Limited (Respondent) v. United Brotherhood of Carpenters and Joiners Oo America, Local 2486 (Intervener)

3074-04-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Generx Corporation and/or Generx (Solara) Corporation (Respondent)

2421-05-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carpet City Inc. carrying on business as Flooring Canada Ottawa (Respondent)

2842-05-R: Labourers' International Union of North America, Local 527 (Applicant) v. Avila Paramount Group of Companies Ltd. (Respondent)

3093-05-R: Canadian Union of Public Employees (Applicant) v. N.Y.A.D. (Community) Inc. (Respondent)

3613-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Lewis Foods Inc. (Respondent)

3749-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Cana Rx Services Inc. (Respondent)

3770-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Sheraton Gateway Hotel (Respondent) v. UNITE HERE Local 75 (Intervener)

3835-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2389-03-R: Society of Energy Professionals (Applicant) v. Ontario Power Generation Inc., Nuclear Safety Solutions Limited, NNC Canada Limited, NNC Holdings Limited (Respondents) v. Power Workers' Union (Intervener) *(Withdrawn)*

2998-04-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Applicant) v. Janzen Plumbing & Heating Ltd., Peter Janzen Heating & Plumbing Inc., Jamie Janzen Plumbing & Heating Inc. (Respondents) *(Dismissed)*

0265-05-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 27 (Applicant) v. Urbacon Limited, Uno Carpentry Limited (Respondents) *(Withdrawn)*

0916-05-R: Labourers' International Union of North America, Local 493 (Applicant) v. Cambrian Construction and Masonry Company, a Division of 385310 Ontario Inc. and, Cambrian Construction (Sudbury) Inc. (Respondents) *(Granted)*

1935-05-R: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. Tavlan Stone Ltd. o/a Moscone Marble & Granite; Moscone Tile Ltd. (Respondents) *(Withdrawn)*

2470-05-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carpet City Inc. carrying on business as Flooring Canada Ottawa, Carpet City Inc. carrying on business as Flooring Canada Ottawa (Respondents) *(Withdrawn)*

3050-05-R: Earlscourt-Creche Child Development Institute (Applicant) v. Canadian Union of Public Employees Local 2132, Ontario Public Service Employees Union Local 567 (Respondents) *(Withdrawn)*

3296-05-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sekhavati Gholamreza and Jamie Lane o/a GTA Forming (a registered business style) and, 1642511 Ontario Inc. c.o.b. GTA Forming (a registered business style) (Respondents) v. Trevor Squire (Intervener) *(Granted)*

3548-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1339510 Ontario Inc. o/a Howard Johnson and, 1307740 Ontario Ltd. o/a Ramada Express (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

2998-04-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Applicant) v. Janzen Plumbing & Heating Ltd.,, Peter Janzen Heating & Plumbing Inc., Jamie Janzen Plumbing & Heating Inc. (Respondents) *(Granted)*

3745-04-R: Millwrights Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Novelis Inc. and, Alcan Inc. (Respondents) *(Withdrawn)*

0265-05-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 27 (Applicant) v. Urbacon Limited, Uno Carpentry Limited (Respondents) *(Withdrawn)*

0916-05-R: Labourers' International Union of North America, Local 493 (Applicant) v. Cambrian Construction and Masonry Company, a Division of 385310 Ontario Inc. and, Cambrian Construction (Sudbury) Inc. (Respondents) *(Granted)*

1935-05-R: Marble, Tile and Terrazzo Union, Local 31 (Applicant) v. Tavlan Stone Ltd. o/a Moscone Marble & Granite;, Moscone Tile Ltd. (Respondents) *(Withdrawn)*

2470-05-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carpet City Inc. carrying on business as Flooring Canada Ottawa, Carpet City Inc. carrying on business as Flooring Canada Ottawa (Respondents) *(Withdrawn)*

3050-05-R: Earlscourt-Creche Child Development Institute (Applicant) v. Canadian Union of Public Employees Local 2132, Ontario Public Service Employees Union Local 567 (Respondents) *(Withdrawn)*

3296-05-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sekhavati Gholamreza and Jamie Lane o/a GTA Forming (a registered business style) and, 1642511 Ontario Inc. c.o.b. GTA Forming (a registered business style) (Respondents) v. Trevor Squire (Intervener) *(Granted)*

3548-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1339510 Ontario Inc. o/a Howard Johnson and, 1307740 Ontario Ltd. o/a Ramada Express (Respondents) *(Withdrawn)*

UNION SUCCESSOR RIGHTS

2793-05-R: Eastern Ontario Volunteer Firefighters Association, Local 920 affiliated with the Christian Labour Association of Canada (Applicant) v. Christian Labour Association of Canada and, City of Quinte West (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3159-05-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America and Allied Construction Employees, Local 1030, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Dismissed)*

3474-05-R: Laura Kelly (Applicant) v. Service Employees Union, Local 1.ON (Respondent) *(Granted)*

Unit: "all employees of Wymering Manor in Ottawa, save and except Managers, persons above the rank of Manager and house co-ordinator and the Owner's personal secretary" (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7
Number of ballots segregated and not counted	0

3542-05-R: Adam Jennings (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. Brant Screen Craft Limited (Intervener) *(Dismissed)*

3574-05-R: Dan Howe et al (Applicant) v. Canadian Auto Workers Union Local 127 (Respondent) *(Granted)*

Unit: "all employees of Ontario Engineered Suspensions Ltd. in Blenheim, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (144 employees in unit)

Number of names of persons on revised voters' list	144
Number of persons who cast ballots	125
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	125
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	61
Number of ballots marked against respondent	64
Number of ballots segregated and not counted	0

3625-05-R: Salvation Army/Bunton Lodge/WP Archibald Ctr. (Applicant) v. Teamsters Local Union 938 (Respondent) v. The Salvation Army Bunton Lodge/W.P. Archibald Centre (Intervener) *(Dismissed)*

3670-05-R: Anita Lavergne, Viviane Léger & Lorraine Astley (Applicant) v. United Food and Commercial Workers Union, Local 175 (Respondent) v. Compass Group Canada (Beaver) Ltd. (Intervener) *(Dismissed)*

3675-05-R: Dave Hamdorf, Brian Guy, Hagen Kentel (Applicant) v. United Food and Commercial Workers Canada, Local 1000A (Respondent) v. National Grocers Co. Ltd. (Intervener) *(Dismissed)*

Unit: "The Company recognizes the Union as the exclusive bargaining agent for those employees that are identified in "Appendix C.01 and C.02" to this Agreement and who are located at Fresh Distribution Facility, Ontario, 1105 Fountain Street North, Cambridge, Ontario" (1193 employees in unit)

Number of names of persons on revised voters' list	1084
Number of persons who cast ballots	780
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	769
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	11
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	509
Number of ballots marked against respondent	260
Number of ballots segregated and not counted	8

3676-05-R: Michelle Dawn Strickland (Applicant) v. Ontario Public Service Employees Union and its Local 309 (Respondent) v. John Howard Society of Victoria/Haliburton/Simcoe & Muskoka (Intervener) *(Dismissed)*

Unit: "all employees of John Howard Society of Victoria/ Haliburton/Simcoe & Muskoka, in the Counties of Simcoe, the County of Haliburton and the City of Kawartha Lakes, save and except supervisors, persons above the rank of supervisor, Financial Co-ordinator, Administrative Assistant and students" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	0

3708-05-R: David Tuppenney (Applicant) v. United Steelworkers of America (Respondent) *(Dismissed)*

3709-05-R: Adam Jennings (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W Canada) (Respondent) *(Dismissed)*

3912-05-R: Pat Sloan and other employees of Lows Glass and Mirror (Applicant) v. Christian Labour Association of Canada (Respondent) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0500-03-U: Teamsters Local Union 938 (Applicant) v. Autoport Limited (Respondent) v. Canadian Union of Operating Engineers and General Workers (Intervener) *(Withdrawn)*

0976-03-U: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Tristar Interior Contractors Inc. (Respondent) *(Withdrawn)*

2263-03-U: The Ontario Public Service Employees Union (Applicant) v. The County of Frontenac (Respondent) *(Withdrawn)*

2897-03-U: International Union of Operating Engineers, Local 793 (Applicant) v. James Dick Construction Limited (Respondent) *(Withdrawn)*

3760-03-U: Society of Energy Professionals (Applicant) v. Nuclear Safety Solutions Limited (Respondent) *(Withdrawn)*

0081-04-U: Labourers' International Union of North America, Local 506 (Applicant) v. TriAxis Construction Limited (Respondent) *(Withdrawn)*

0202-04-U: David Cox (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444 (Respondent) v. DaimlerChrylser Canada Inc. (Intervener) *(Dismissed)*

0713-04-U: Katrina Bergie (Applicant) v. Employees' Association of Kodak Canada (Respondent) v. Kodak Canada Inc. (Intervenor)

1639-04-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Robinson-Adams Overhead Doors Inc. and, Westwood Garage Doors Ltd. and, Royal Overhead Doors Ltd. (Respondents) *(Dismissed)*

3042-04-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. John Gaffney Construction Company Limited and/or O.J. Gaffney Limited and/or Gaffney Data Centre (Respondent) *(Withdrawn)*

3811-04-U: Teamsters, Local Union No. 419 (Applicant) v. Prologix Distribution Services (Respondent) *(Withdrawn)*

4564-04-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Kemp Electrical Services Ltd. (Respondent) *(Withdrawn)*

0090-05-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Community Safety and Correctional Services Toronto East Detention Centre (Respondent) *(Withdrawn)*

0529-05-U: A.C. Concrete Forming Ltd. (Applicant) v. The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity (Respondent) v. Universal Workers Union, L.I.U.N.A. Local 183 (Intervener) *(Withdrawn)*

0706-05-U; 1015-05-U: Blue Man Toronto, LLC (Applicant) v. Canadian Actors' Equity Association and Ken Burns and Susan Wallace (Respondent); Mr. Tony Ambrosi and Ms. Sharon Diamond (Applicant) v. Canadian Actors' Equity Association and Susan Wallace and Henry Gauthier and Ken Burns and Allan Teichman and Donna Fletcher (Respondent) *(Dismissed)*

0712-05-U: Stella Taylor (Applicant) v. CUPE Local 148 (Respondent) *(Withdrawn)*

1049-05-U: Yolanda Bautista (Applicant) v. United Food & Commercial Workers Union, Local 175 (Respondent) v. Maple Lodge Farms Ltd. (Intervener) *(Dismissed)*

1341-05-U: United Food & Commercial Workers Canada Locals 175 & 633 (Applicant) v. The Solar Group Inc. and Jonathan Lay and David Duke (Respondent) *(Withdrawn)*

1372-05-U: Teamsters International Union, Local 847 (Applicant) v. Triumbari Corp. (Respondent) *(Withdrawn)*

1413-05-U: Tyler Gilbart (Applicant) v. Communications, Energy and Paperworkers Union of Canada Local Union 38-X (Respondent) v. Northern Sawmills Inc. (Intervener) *(Dismissed)*

1432-05-U: Communications, Energy and Paperworkers Union of Canada, Local 500-G (Applicant) v. FPC Flexible Packaging Corporation (Respondent) *(Terminated)*

1656-05-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Omni Facility Services Canada Corp. (Respondent) *(Terminated)*

1818-05-U: Adolphus Smallwood (Applicant) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local Union No. 647 (Respondent) *(Withdrawn)*

1838-05-U; 2644-05-U: Gus Nedelkopoulos (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 222 (Respondent) v. A.G. Simpson Automotive Systems (Intervener); Gus Nedelkopoulos (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. A.G. Simpson Automotive Systems (Intervener) *(Dismissed)*

1882-05-U: Mechanical Contractors Association of Ontario (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (Respondent) v. Ontario Pipe Trades Council (Intervener) *(Withdrawn)*

1911-05-U: Jim W. Priebe (Applicant) v. Elementary Teachers' Federation of Ontario (Respondent) *(Withdrawn)*

1953-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Laurentian Child and Family Centre (Respondent) *(Withdrawn)*

2069-05-U: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. United Brotherhood of Carpenters and Joiners of America (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers (Intervener) *(Dismissed)*

2106-05-U: Jasvir Mangat (Applicant) v. Teamsters Union Local 938 (Respondent) *(Withdrawn)*

2192-05-U: Winsome Wilson (Applicant) v. Canadian Union of Public Employees, Local 1590 (Respondent) v. Providence Healthcare (Intervener) *(Dismissed)*

2244-05-U: Communication, Energy and Paperworkers Union of Canada, CLC, Local 28-0, and Blair McNeil, Steve Hatch, Ray Cirtwell, Gordon Graves, Paul Hollingsworth, Sue Hill, Bill Reitsma and Robert Graham (Applicant) v. Invista (Canada) Company, Maitland Site (Formerly Dupont Canada Inc.) (Respondent) *(Terminated)*

2263-05-U: The Ontario Public Service Employees Union (Applicant) v. The County of Frontenac (Respondent) *(Withdrawn)*

2302-05-U: Errol Farauharson (Applicant) v. Canadian Union of Public Employees and its Local 5001 (Respondent) v. University Health Network (Intervener) *(Dismissed)*

2430-05-U: Daniel Foster (Applicant) v. UAW Local 251 (Respondent) v. H.E. Vannatter Limited (Intervener) *(Withdrawn)*

2459-05-U: Vittorio Pento (Applicant) v. United Steelworkers of America Local 8059 (Respondent) v. Acadian Platers Company Limited (Intervener) *(Withdrawn)*

2517-05-U; 2523-05-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Canada Pallet Corp. (Respondent); Canada Pallet Corp. (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) *(Withdrawn)*

2522-05-U: Norman Allen (Applicant) v. Canadian Union of Public Employees, Local 87, The Corporation of the City of Thunder Bay (Respondents) *(Dismissed)*

2552-05-U: United Food and Commercial Workers Union, Local 1977 (Applicant) v. Ontario Sheet Metal Workers' & Roofers' Conference (Respondent) *(Withdrawn)*

2609-05-U: Michael Cait (Applicant) v. CUPE Local 79 (Respondent) v. The City of Toronto (Intervener) *(Dismissed)*

2693-05-U: Janet Adams (Applicant) v. Canadian Union of Public Employees and its Local 2936-02, Community Living Oshawa/Clarington (Respondents) *(Withdrawn)*

2715-05-U; 3326-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers") (Applicant) v. Metrican Manufacturing Co. Inc. (Respondent) *(Withdrawn)*

2807-05-U: John Taggart (Applicant) v. CAW Local 195 (Respondent) *(Withdrawn)*

2892-05-U: Kathleen Banis (Applicant) v. Mohawk Hospital Services Inc. (Respondent) v. Canadian Union of Public Employees and its Local 1605 (Intervener) *(Withdrawn)*

2949-05-U: Adlai F. Hidalgo (Applicant) v. Universal Workers Union Local 183 (Respondent) *(Dismissed)*

2950-05-U: Ted Addante (Applicant) v. Hotel, Hospitality & Casino Workers Union, Local 7/11 (Respondent) v. Woodbine Entertainment Group (Intervener) *(Dismissed)*

2951-05-U: Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. Amsterdam Products Ltd. (Respondent) *(Withdrawn)*

2962-05-U; 3000-05-U; 3001-05-U; 3015-05-U: Ronald Franklin (Applicant) v. Ontario Public Service Employees Union "OPSEU" (Respondent) v. Municipal Property Assessment Corporation (Intervener); Jerry Kocijowsky (Applicant) v. Ontario Public Service Employees Union "OPSEU" (Respondent) *(Terminated)* Christian Stoeken (Applicant) v. Ontario Public Service Employees Union "OPSEU" (Respondent) v. Municipal Property Assessment Corporation (Intervener) Paul Alves (Applicant) v. Ontario Public Service Employees Union "OPSEU" (Respondent) v. Municipal Property Assessment Corporation (Intervener) *(Withdrawn)*

3038-05-U: Orazio Baldesarra (Applicant) v. Carlo Summaria and Communication, Energy & Paperworkers' Union Local 1144 (Respondent) v. Hilroy-Meadwestvaco Canada L.P. (Intervener) *(Withdrawn)*

3106-05-U: Teamsters Local 938 (Applicant) v. Imperial Manufacturing Group (Respondent) *(Withdrawn)*

3109-05-U: International Association of Machinists and Aerospace Workers (Applicant) v. Mikor Metal Products Inc. (Respondent) *(Withdrawn)*

3110-05-U: Canadian Union of Public Employees (Applicant) v. N.Y.A.D. (Community) Inc. (Respondent) *(Withdrawn)*

3115-05-U: Dimce Jockovski (Applicant) v. Sheet Metal Workers' International Association, Local 30 (Respondent) *(Withdrawn)*

3120-05-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Hank Deenen Landscaping Limited (Respondent) *(Withdrawn)*

3149-05-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. JV Mechanical Limited (Respondent) *(Withdrawn)*

3156-05-U: Paul Pereira (Applicant) v. Brewery General and Professional Workers Union (Respondent) v. University Health Network (Intervener) *(Withdrawn)*

3190-05-U: Service Employees International Union - Local Lon (Applicant) v. Southwind Retirement Residence, Chartwell Seniors Housing REIT, Andrew Davidson, Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Respondents) *(Withdrawn)*

3196-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Mott Manufacturing Limited (Respondent) *(Withdrawn)*

3206-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers") (Applicant) v. Riviera Security Services Inc. (Respondent) *(Withdrawn)*

3219-05-U: Canadian Union of Public Employees Local 4684 (Applicant) v. Belmont Long Term Care Facility (Belcrest Nursing Homes Ltd.) (Respondent) *(Withdrawn)*

3238-05-U: Bowater Canadian Forest Products Inc. Thunder Bay Woodlands (Applicant) v. United Steelworkers of America, Local 1-2693 (Respondent) *(Withdrawn)*

3245-05-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1642511 Ontario Inc. c.o.b. GTA Forming (a registered business style) and/or, Sekhavati Gholamreza and Jamie Lane o/a GTA Forming (a registered business style), and, Kenaidan Contracting Ltd. (Respondents) v. Trevor Squire (Intervener) *(Withdrawn)*

3246-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Canadian Lakehead Exhibition (Respondent) *(Withdrawn)*

3258-05-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Acorn Packaging, Inc. (Respondent) *(Withdrawn)*

3393-05-U: Kenneth William Day (Applicant) v. Teamsters Local Union No. 419 (Respondent) *(Withdrawn)*

3516-05-U: Chau Le (Applicant) v. Algoods Inc. (Respondent) *(Dismissed)*

3523-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Fresh Mix Ltd. (Respondent) *(Dismissed)*

3549-05-U; 3550-05-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1307740 Ontario Ltd. o/a Ramada Express (Respondent); United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1339510 Ontario Inc. o/a Howard Johnson (Respondent) *(Withdrawn)*

3624-05-U: Everbrite Industries Ltd. (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent) *(Terminated)*

3629-05-U: Greg Gray (Applicant) v. C.U.P.E. Local 122 (Respondent) v. The Corporation of the City of North Bay (Intervener) *(Dismissed)*

APPLICATION FOR INTERIM ORDER

3055-05-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. United Brotherhood of Carpenters and Joiners of America (Respondent) *(Dismissed)*

3107-05-M: Teamsters Local 938 (Applicant) v. Imperial Manufacturing Group (Respondent) *(Withdrawn)*

3243-05-M: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Fernbrook Homes Limited (Respondent) *(Terminated)*

3395-05-M: Public Service Alliance of Canada (Applicant) v. Ontario Lottery and Gaming Corporation (Respondent) *(Dismissed)*

3588-05-M: Ontario Public Service Employees Union Heather Leclerc (Applicant) v. Community Living, Huntsville Beth Ward -and- Sandy Nicholson (Respondent) *(Terminated)*

3601-05-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Nel-Tekk Industrial Specialties Inc. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3671-05-M: The Governing Council of the University of Toronto (Applicant) v. International Association of Machinists and Aerospace Workers, Local 235 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

2429-03-JD: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Adam Clark Company Ltd., International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 and, Millwrights Union, Local 2309 (Respondents) *(Dismissed)*

2202-04-JD: The Crown in Right of Ontario as represented by The Ministry of Consumer & Business Services (Applicant) v. Ontario Public Services Employees' Union (Respondent) *(Terminated)*

2500-05-JD: The Community Care Access Centre of York Region (Applicant) v. The Canadian Union of Public Employees, Local 905 (Respondent) v. Ontario Nurses' Association (Intervener) *(Dismissed)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0914-05-OH: Daniel A. Flatt (Applicant) v. P.G. Disposal Services (Respondent) *(Withdrawn)*

1342-05-OH: United Food & Commercial Workers Canada Locals 175 & 633 (Applicant) v. The Solar Group Inc. and Jonathan Lay and David Duke (Respondent) *(Withdrawn)*

2011-05-OH: Peter Neilson (Applicant) v. National Steel Car Limited (Respondent) *(Withdrawn)*

2091-05-OH: Robert Conroy and Dan Conroy (Applicant) v. National Tote Service (Respondent) *(Withdrawn)*

2690-05-OH: Chris J. Black (Applicant) v. Carrier Truck Centre (Respondent) *(Withdrawn)*

2782-05-OH: Sydney William Fawcett (Applicant) v. Airboss Rubber Compounding (Respondent) *(Withdrawn)*

2825-05-OH: Heather Stanley (Applicant) v. Yachiyo of Ontario Mfg., Inc. (Respondent) *(Withdrawn)*

2945-05-OH: Casey Martin (Applicant) v. Coquette International Inc. (Respondent) *(Withdrawn)*

3271-05-OH: Robert Gordon (Applicant) v. Ministry of Community Safety and Correctional Services (Respondent) *(Dismissed)*

3335-05-OH: Sandra Marlene Passmore (Applicant) v. Meeussen Ltd. o/a Tim Horton's (Respondent) *(Terminated)*

CONSTRUCTION INDUSTRY GRIEVANCES

2764-03-G: Labourers' International Union of North America, and The Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hydro One Inc. (Respondent) v. Universal Workers Union, L.I.U.N.A. Local 183 (Intervener) *(Terminated)*

2471-05-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carpet City Inc. (Respondent) *(Withdrawn)*

2666-05-G: Labourers' International Union of North America, Local 625 (Applicant) v. Coco Group of Companies (Respondent) *(Withdrawn)*

2718-05-G: Labourers' International Union of North America, Local 506 (Applicant) v. Beaver Construction Services Corp. (Respondent) *(Granted)*

2753-05-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Southern Arrow Ltd. (Respondent) *(Endorsed Settlement)*

3331-05-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Fernbrook Homes (Respondent) *(Withdrawn)*

3365-05-G: Universal Worker's Union, L.I.U.N.A., Local 183 (Applicant) v. Nuway Utilities Inc. (Respondent) *(Granted)*

3405-05-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Catalyst Technology (Canada) Ltd. (Respondent) *(Endorsed Settlement)*

3424-05-G: International Union of Elevator Constructors, Local 50 (Applicant) v. ThyssenKrupp Elevator (Canada) Limited (Respondent) *(Withdrawn)*

3449-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ellis-Don Corporation (Respondent) *(Withdrawn)*

3476-05-G: Labourers' International Union of North America, Local 506 (Applicant) v. Aristeo Construction International Inc. (Respondent) *(Withdrawn)*

3486-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Bowater Mechanical Ltd. (Respondent) *(Granted)*

3512-05-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sava Contracting Inc. (Respondent) *(Endorsed Settlement)*

3518-05-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Yustin Interiors Limited (Respondent) *(Granted)*

3546-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Tevfik Hayirsoz and Sezen Hayirsoz c.o.b. as Erkan Stucco (Respondent) *(Granted)*

3586-05-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2486 (Applicant) v. Cecchetto & Sons Ltd. (Respondent) *(Withdrawn)*

3682-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 721 (Applicant) v. L & M Metal Erectors (Respondent) *(Withdrawn)*

3703-05-G: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Kile Contr. Inc. (Respondent) *(Withdrawn)*

3723-05-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1232427 Ontario Ltd. c.o.b. as TGM Services, Marksbury Group Ltd. (Respondent) *(Granted)*

3750-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ismail Yilmaz c.o.b. as Hakim General Contractor (Respondent) *(Granted)*

3751-05-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Youngs Architectural Glazing Ltd. (Respondent) *(Granted)*

3779-05-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 1323816 Ontario Inc o/a Metal-Con Mechanical (Respondent) *(Terminated)*

3780-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Bella Painting Ltd. (Respondent) *(Granted)*

3803-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. On Time Construction Ltd. and, Mr. Brendan Gibney (Respondents) *(Withdrawn)*

3857-05-G: Labourers' International Union of North America, Local 506 (Applicant) v. Dalton Engineering & Construction Co. Ltd. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

0079-04-ES: Blackstar Personal Services Inc. (Applicant) v. Mark Bradshaw and, Director of Employment Standards (Respondents) *(Granted)*

0800-04-ES; 0801-04-ES; 0802-04-ES: Assurant Group (Applicant) v. Theresa Sultana and, Director of Employment Standards (Respondents); Assurant Group (Applicant) v. Norma Dalton and, Director of Employment Standards (Respondents); Assurant Group (Applicant) v. Romayne Jayavendra and, Director of Employment Standards (Respondents) *(Dismissed)*

1286-04-ES: Jerome Stanleight, a Director of the Ritz Banquet Hall (2000) Inc., (Applicant) v. Mario Mecchini and Mihaela Borta and, Director of Employment Standards (Respondents) *(Granted)*

1838-04-ES: D-Zign Interior Planning & Project Management Inc. (Applicant) v. Ana Laura Madariaga and, Director of Employment Standards (Respondents) *(Granted)*

3850-04-ES: Goswell Associates Limited o/a Burger King (Applicant) v. Nancy MacKay, Jasmine Dagenais and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4087-04-ES: Natalia Dobrovolskaia (Applicant) v. ING Canada Inc. - Belair Direct Insurance Co. and, Director of Employment Standards (Respondents) *(Withdrawn)*

4174-04-ES: Trina St. Amour (Applicant) v. Feldman Timber Company Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

4500-04-ES: Stevo Jakovljevic (Applicant) v. United Store Fixtures Corporation and, Director of Employment Standards (Respondents) *(Dismissed)*

0117-05-ES: Jennifer Cole (Applicant) v. 728984 O.L. o/a Dundas License Bureau and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0130-05-ES: Peter R. Ramsay/Ramsay Law Office (Applicant) v. Erin Mackey and, Director of Employment Standards (Respondents) *(Withdrawn)*

0370-05-ES: Ray Daniel Salon and Spa (Applicant) v. Sandra Massicotte and, Director of Employment Standards (Respondents) *(Withdrawn)*

0398-05-ES: Mauro Calicchia a Director of 1455662 Ontario Limited o/a Active Green & Ross (Applicant) v. Luca Ferraro and Vasilios Justin Avery and, Director of Employment Standards (Respondents) *(Dismissed)*

0490-05-ES: Canadian Bonded Credits Limited (Applicant) v. James Pare and, Director of Employment Standards (Respondents) *(Granted)*

0577-05-ES: Mike Rice (Applicant) v. Casino Rama and, Director of Employment Standards (Respondents) *(Dismissed)*

0871-05-ES: Taylor Wright (Applicant) v. D.C. Angler Inc. o/a Canadian Fishing Tour and, Director of Employment Standards (Respondents) *(Granted)*

1012-05-ES: Jeremy Kessler Canadian Mustard Inc. (Applicant) v. Julia Kogan and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1363-05-ES: Sixto (Steve) Ildefonso (Applicant) v. Rochester Aluminum Smelting Canada Limited, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1508-05-ES: Abiwin Co-operative Inc. (Applicant) v. David Trainer and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1749-05-ES: Eric Rechnitzer (Applicant) v. Vio Systems Inc. o/a Vio Ecowater Systems and, Director of Employment Standards (Respondents) *(Granted)*

1821-05-ES: Yves Rocher Boutiques Inc. (Applicant) v. Directeur des normes d'emploi (Respondent) *(Withdrawn)*

1846-05-ES: QEW 427 Chrysler (Applicant) v. Ahmad Nabtiti and, Director of Employment Standards (Respondents) *(Dismissed)*

1853-05-ES: Clifford J. Anderson (Applicant) v. Superior Electrics Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

1944-05-ES: Crown Hospitality Suites Inc. (Applicant) v. Jane Teft and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1955-05-ES: Muhammad Ashraf (Applicant) v. Imperial Plastics Co. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2073-05-ES: Ultra-Form Mfg. Co. Ltd. (Applicant) v. Annand Singh and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2077-05-ES: Sears Canada (Applicant) v. Josee Poirier and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2118-05-ES: Univision Marketing Group Inc. (Applicant) v. Elizabeth Butty and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2198-05-ES: Jayme-Leigh Rock (Applicant) v. Cafe Magenta and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2255-05-ES: 1546617 Ontario Limited (Applicant) v. Mila Li and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2257-05-ES: Country Style Donuts (Applicant) v. Claudia Durigon and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2313-05-ES: Primont Management Corporation operating as Primont Homes (Applicant) v. Linda West, Director of Employment Standards (Respondents) *(Withdrawn)*

2400-05-ES: 1561024 Ontario Inc. operating as All Truck Parking (Applicant) v. Nachhattar Singh Chahal and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2563-05-ES: Deepak Bahl (Applicant) v. 1453664 Ontario Inc. o/a The Earl of Whitchurch and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2575-05-ES: David Spuria (Applicant) v. Formet Industries and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2651-05-ES: 1331932 Ontario Ltd. o/a Wobbley Pop's Bar and Grill (Applicant) v. Paula-Lynn Harper and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2684-05-ES: Dillon Industries Ltd. (Applicant) v. Allan Smollett and, Director of Employment Standards (Respondents) *(Dismissed)*

2720-05-ES: Acchuman Executive Search Inc. (Applicant) v. Tracy Clancy and, Director of Employment Standards (Respondents) *(Dismissed)*

2730-05-ES: Leggat Chevrolet Ltd. (Applicant) v. Angela Flores and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2734-05-ES: Keith's Plumbing and Heating Inc. (Applicant) v. Lynda Gazda and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2757-05-ES: Attridge Transportation Inc. (Applicant) v. Glenn Stewart and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2887-05-ES: Gail Jardine (Applicant) v. GWL Realty Advisors Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2897-05-ES: Pickering Performance Tire & Automotive Inc. (Applicant) v. Todd Brooks and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2899-05-ES: Kannathasam Arunasalam (Applicant) v. Pizza Hut and, Director of Employment Standards (Respondents) *(Terminated)*

2900-05-ES: S.J. Woodworking Limited (Applicant) v. David Silverstein and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2980-05-ES: Royal Canadian Legion Branch 528 (Applicant) v. Karen Evans and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3004-05-ES: Country Style Donuts (Applicant) v. Susan A. Tovey, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3053-05-ES: Infolink Technologies Ltd. (Applicant) v. Bradley Walker and, Director of Employment Standards (Respondents) *(Withdrawn)*

3085-05-ES: Thomas Salvatore Giglione (Applicant) v. Vineland Estates Winery and, Director of Employment Standards (Respondents) *(Terminated)*

3086-05-ES: Abbas Goudarzi (Applicant) v. The Village Terraces & The Village Terraces Directors, Metropolitan Toronto Condominium Corp. No. 563, Director of Employment Standards (Respondents) *(Dismissed)*

3127-05-ES: Elizabeth McLean (Applicant) v. Pollara Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3129-05-ES: Pollara Inc. (Applicant) v. Elizabeth McLean and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3135-05-ES: Orient International Travel UAE (Canada) Ltd. (Applicant) v. Munir Mawla and, Director of Employment Standards (Respondents) *(Dismissed)*

3146-05-ES: Eleta Pfaff (Applicant) v. Sears Floor Covering Centre and (Respondent) *(Endorsed Settlement)*

3179-05-ES: Peter Beeching (Applicant) v. Debt Control Agency, Director of Employment Standards (Respondents) *(Withdrawn)*

3180-05-ES: Beauty Systems Group (Canada) Inc. (Applicant) v. Rhonda Williams, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3182-05-ES: Nancy Lee Seager (Jones) (Applicant) v. 1264000 Ontario Inc. and 1574942 Ontario Ltd. operating as Tim Hortons and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3194-05-ES: Razavi Enterprises (Carlingwood) Ltd. o/a Nutrition House (Applicant) v. Richard Green and, Director of Employment Standards (Respondents) *(Terminated)*

3197-05-ES: Jerry McCorkwell (Applicant) v. Essex Condominium Corp. #25, Director of Employment Standards (Respondents) *(Withdrawn)*

3198-05-ES: Rachel Labelle (Applicant) v. 879815 Ontario Inc. operating as Tim Hortons, and, Director of Employment Standards (Respondents) *(Terminated)*

3225-05-ES: Dawn White (Applicant) v. TI Automotive Systems Div. of TI Group Automotive Systems and, Director of Employment Standards (Respondents) *(Withdrawn)*

3248-05-ES: EPT Industries Inc. (Applicant) v. Jason Defreitas and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3263-05-ES: Riverside Landscaping Contractors Inc. (Applicant) v. Shaun Stevenson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3264-05-ES: Riverside Landscaping Contractors Inc. (Applicant) v. Patrick Murphy and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3268-05-ES: Yongkui (Angela) Zhang (Applicant) v. Tripmate Travel & Tour Guide Company Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3287-05-ES: Ronald T. James & Associates (Applicant) v. Cathy Smart and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3289-05-ES: Kirusiya Arumuganathan (Applicant) v. Rendezvous Childcare Centre and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3299-05-ES: Elsen Electric Inc. (Applicant) v. Alexandros Spyridakis and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3359-05-ES: Essence Incorporated (Applicant) v. Robert Murdoch, Director of Employment Standards (Respondents) *(Terminated)*

3380-05-ES: Eleni Chatzidimitriou (Applicant) v. Baker's Dozen / St. Jude Retirement Home Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

3439-05-ES: Crystal Nicholson (Applicant) v. Sugar Chalet, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3443-05-ES: Lennie Moyes (Applicant) v. Cody Party Centre and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3455-05-ES: Charles Poelmann (Applicant) v. Hamilton Volkswagen Audi and Director of Employment Standards (Respondents) *(Dismissed)*

3519-05-ES: Kung Chan Fan (Applicant) v. Century Circuits Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3599-05-ES: Salon Concepts Spa Inc. (Applicant) v. Leslie Anne Branscomb and, Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1537-05-HS: Transcontinental Interweb Toronto (Applicant) v. Ken Lowe, Worker Representative of the Joint Health and Safety Committee and, Stella Barber, Inspector (Respondents) *(Withdrawn)*

2253-05-HS: Stelco Inc. (Applicant) v. United Steelworkers of America, Local 1005, Scott Hanville, Inspector (Respondents) *(Withdrawn)*

2254-05-HS: Stelco Inc. (Applicant) v. United Steelworkers of America, Local 1005, Scott Hanville, Inspector (Respondents) *(Terminated)*

3037-05-HS: Elite Personnel (Applicant) v. Elizabeth Bojkovski and, Thomas Proctor, Inspector (Respondents) *(Withdrawn)*

3391-05-HS: C.A.W. Local 1256 (Applicant) v. Oakville Transit and, Paul Van Heertum, Inspector (Respondents) *(Withdrawn)*

3632-05-HS: Street Cartage Limited (Applicant) v. Dennis Wilson, Inspector (Respondent) *(Dismissed)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

2589-05-PS: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local No. 222 (Applicant) v. Ajax/Pickering Transit Authority, Town of Whitby, Town of Clarington, Oshawa Transit Service, Handi Transit, Canadian Union of Public Employees, Local 129-01, Canadian Union of Public Employees, Local 53, Teamsters Local 938 (Respondents) v. Durham Region Planning Department (Intervener) *(Granted)*

REFERRAL FROM MINISTER

3177-05-M: Service Employees' International Union Local 1.on (Applicant) v. Niagara Arms Retirement Hotel Inc. and Niagara Arms Retirement Residence Inc. (Respondent) *(Granted)*

3230-05-M: Canadian Union of Public Employees, Local 3823 (Applicant) v. St. Anne's Place (Respondent) *(Terminated)*

3501-05-M: Unite HERE Local 75 (Applicant) v. Canadian Niagara Hotels Inc. (Respondent) *(Terminated)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

4540-04-U: Gilbert McIntyre (Applicant) v. Ontario Secondary School Teachers' Federation, District 12 (Respondent) v. Toronto District School Board (Intervenor) *(Dismissed)*

0163-05-OH; 1574-05-OH: Frank Villella (Applicant) v. Chubb Security Systems - A division of CSG Security Inc. (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervenor); Frank Villella (Applicant) v. Chubb Security Systems - a division of CSG Security Inc. (Respondent) *(Dismissed)*

0293-05-ES: Paul Ravenhill (Applicant) v. Princess Auto Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

0370-05-ES: Ray Daniel Salon and Spa (Applicant) v. Sandra Massicotte and, Director of Employment Standards (Respondents) *(Withdrawn)*

2370-05-G: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers and its Local 736 (Applicant) v. E.S. Fox Limited (Respondent) *(Dismissed)*

2657-05-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. Carleton Iron Works Co. Limited (Respondent) *(Dismissed)*

2778-05-R; 3159-05-R; 3243-05-M: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Fernbrook Homes Limited (Respondent) v. Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, Local 1030 (Intervener); Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America and Allied Construction Employees, Local 1030, United Brotherhood of Carpenters and Joiners of America (Respondent); Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Fernbrook Homes Limited (Respondent) *(Dismissed)*

2950-05-U: Ted Addante (Applicant) v. Hotel, Hospitality & Casino Workers Union, Local 7/11 (Respondent) v. Woodbine Entertainment Group (Intervenor) *(Dismissed)*

3455-05-ES: Charles Poelmann (Applicant) v. Hamilton Volkswagen Audi, Director of Employment Standards (Respondents) *(Dismissed)*

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 2006

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1212-05-R: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. S & R Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of S & R Construction Ltd. In the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of S & R Construction Ltd. In all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

2501-05-R: Labourers' International Union of North America, Local 527 (Applicant) v. NCI Ottawa Inc. (Respondent)

Unit: "all construction labourers in the employ of NCI Ottawa Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of NCI Ottawa Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

3374-05-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. The Board of Governors of Exhibition Place (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervenor)

Unit: "all painters and painters' apprentices in the employ of The Board of Governors of Exhibition Place in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of The Board of Governors of Exhibition Place in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Having regard to the agreement of the parties.)* (Clarity Note)

3488-05-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Boretta Construction 2002 Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Boretta Construction 2002 Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Boretta Construction 2002 Ltd. in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

3696-05-R: Brick and Allied Craft Union of Canada (Applicant) v. North-Tech Ceramic Tile also d.b.a. North-Tech Ceramics (Respondent)

Unit: "all marble, tile and terrazzo, cement masons and resilient floor layers and heir helpers, their respective apprentices, improvers and working forepersons in the employ of North-Tech Ceramic Tile also d.b.a. North-Tech Ceramics in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3697-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. North-Tech Ceramic Tile also d.b.a. North-Tech Ceramics (Respondent)

Unit: "all construction labourers in the employ of North-Tech Ceramic Tile also d.b.a. North-Tech Ceramics in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of North-Tech Ceramic Tile also d.b.a. North-Tech Ceramics in all sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3827-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Martin Utility Corp. (Respondent)

Unit: "all construction labourers in the employ of Martin Utility Corp. within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

3923-05-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Balko Drywall Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Balko Drywall Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of Balko Drywall Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (Clarity Note)

3977-05-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. SBL Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of SBL Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of SBL Electric Inc. in all sectors of the construction industry in The City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

4129-05-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Blue Line Plumbing & Heating Ltd. (Respondent) v. Robert White (Intervenor)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Blue Line Plumbing & Heating Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Blue Line Plumbing & Heating Ltd. in all sectors of the construction industry in the City of Toronto, the Regional

Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

4134-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Custom Aluminum Inc. (Respondent)

Unit: "all journeymen and apprentice carpenters and all construction labourers in the employ of Custom Aluminum Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (26 employees in unit)

Bargaining Agents Certified Subsequent to Vote

1318-05-R: International Union of Painters and Allied Trades, Local 1824 (Applicant) v. Aves & Shaw Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Aves & Shaw Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of Aves & Shaw Limited in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	7

2590-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Mews Chevrolet Limited (Respondent)

Unit: "all employees of Mews Chevrolet Limited in the City of Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed for the school vacation period" (36 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38

Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	2

3336-05-R: Service Employees International Union, Local 1.on (Applicant) v. Oakwood Retirement Communities Inc. (Respondent) v. Canadian Health Care Workers (CHCW) (Intervenor)

Unit: "all Long Term Care and Retirement Home employees in the following locations (except The Village of Riverside Glen Retirement Home; 60 Woodlawn Road East, Guelph N1H 8M8) located at the following addresses: The Village of Tansley Woods (1999 Itasbashi Way, Burlington L7M 4W8), The Village of Sandalwood Park (425 Great Lakes Drive, Brampton L6R 2W8), The Village of Erin Meadows (2930 Erin Centre Blvd., Mississauga L5M 7M4), The Village of Humber Heights (2245 Lawrence Avenue West, Etobicoke M9P 2A2), The Village of Taunton Mills (3800 Brock Street North, Whitby L1R 3A5), The Village of Riverside Glen Long Term Care Facility (60 Woodlawn Road East, Guelph N1H 8M8), save and except nurse managers, registered nurses, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and all persons providing contractual services" (936 employees in unit)

Number of names of persons on revised voters' list	878
Number of persons who cast ballots	549
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	542
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	338
Number of ballots marked in favour of intervener	99
Number of ballots segregated and not counted	7

3681-05-R: Teamsters Local Union No. 938 (Applicant) v. Stock Transportation Ltd. (Respondent)

Unit: "all employees of Stock Transportation Ltd. employed in its garage in the Town of Oakville, save and except managers and persons above the rank of manager" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

3698-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Nifast Canada Corporation (Respondent)

Unit: "all employees of Nifast Canada Corporation facility in the City of Ingersoll, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff" (18 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3747-05-R: International Association of Machinists and Aerospace Workers (Applicant) v. Mettler Toledo Inc. (Respondent)

Unit: "all employees of Mettler Toledo Inc. working at or out of the City of London, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	

3748-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Clarke Pontiac Buick GMC Ltd. (Respondent)

Unit: "all employees of Clarke Pontiac Buick GMC Ltd. in the Town of Amherstburg, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, cashiers, tower operators and service advisors" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4

Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3813-05-R: Service Employees International Union, Local 1.on (Applicant) v. Retirement Residence Operation (REIT) L.P. (Respondent)

Unit: "all employees of Retirement Residence Operation (REIT) L.P., in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, activity staff, office and clerical staff and maintenance staff" (31 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

3815-05-R: United Food and Commercial Workers Canada, Local 1000A (Applicant) v. Footmaxx Ltd. (Respondent)

Unit: "all employees of Footmaxx Ltd. employed in the City of Toronto, Ontario, save and except office and clerical personnel, sales personnel, clinical services personnel, marketing personnel, finance personnel, customer service personnel, information technology/technical support personnel, managers/supervisors and persons above the rank of manager" (46 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	2

3816-05-R: Canadian Health Care Workers (CHCW) (Applicant) v. Metro Toronto Convention Centre Corporation (Respondent) v. Service Employees International Union, Local 2.on (Intervenor)

Unit: "all Security Officers employed by Metro Toronto Convention Centre Corporation, save and except Managers and persons above the rank of Manager" (29 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	3
Number of ballots segregated and not counted	0

3840-05-R; 3841-05-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada Local 873 (Applicant); International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada Local 667 (Applicant) v. Y & C Productions Inc. (Respondent)

Unit: "all Motion Picture Technicians in the employ of Y & C Productions Inc. in the City of Toronto, save and except Producers and persons above that rank" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	8

3861-05-R: Teamsters Local Union No. 879 (Applicant) v. Carriere Foods (Ontario) Inc., Ingersoll (Respondent)

Unit: "all employees of Carriere Foods (Ontario) Inc. Ingersoll in the frozen food plant in the Township of Southwest Oxford, save and except foreperson, office and sales staff, seasonal employees employed between June 1 and December 20, and all employees covered by exisiting collective agreements" (92 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3905-05-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Ontario Engineered Suspensions Ltd. (Respondent) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Intervenor)

Unit: "all employees of the Ontario Engineered Suspensions Ltd. in Blenheim, in the County of Chatham-Kent, save and except Foremen, persons above the rank of Foreman, Office and Sales Staff, persons regularly employed for not more than twenty-four 24 hours per week and students employed during the school vacation period" (142 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	142
Number of persons who cast ballots	121
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	92
Number of segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	71
Number of ballots marked in favour of intervener	49
Number of ballots marked in favour of no union	1
Number of ballots segregated and not counted	0

3918-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Eberspacher Exhaust Systems Canada Inc. (Respondent)

Unit: "all employees of Eberspacher Exhaust Systems Canada Inc. in the City of Brampton, save and except Supervisors, persons above the rank of Supervisor, Engineering Staff (including programmers), and office staff (including quality control) and clerical" (136 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	136
Number of persons who cast ballots	125
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	125
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	98
Number of ballots marked against applicant	26

3921-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as Slots at Woodbine Racetrack (Respondent)

Unit: "all security officers of the Ontario Lottery and Gaming Corporation c.o.b. as Slots at Woodbine Racetrack at the Woodbine Racetrack Slots in the City of Toronto, save and except dual rate supervisors, persons above the rank of dual rate supervisors, office, clerical, surveillance staff" (111 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	96
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	94
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	43
Number of ballots segregated and not counted	2

3937-05-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Halton (Respondent)

Unit: "all Building Operators employed in the Asset Management Division of the Corporate Services Department of the Regional Municipality of Halton, save and except Supervisors and persons above the rank of Supervisor, persons not regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3944-05-R: Canadian Union of Public Employees (Applicant) v. Come and Play Day Nursery (Respondent)

Unit: "all employees employed at Come and Play Day Nursery in the City of Windsor, save and except the Assistant Supervisor, and persons above the rank of Assistant Supervisor" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3991-05-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Central Care Corporation o/a Bay Ridges Long Term Care Centre (Respondent)

Unit: "all Registered Nurses and Graduate Nurses employed by Bay Ridges Long Term Care Centre in the City of Pickering, save and except the Assistant DOC and those above the rank of Assistant DOC" (13 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7

Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4033-05-R: Canadian Union of Public Employees (Applicant) v. Centennial Place, Millbrook Inc. c.o.b. as Centennial Place Long Term Care Centre (Respondent) v. Centennial Place Staff Association (Intervenor)

Unit: "all employees of Centennial Place Long Term Care Centre at Millbrook, Ontario save and except Managers, Supervisors, Directors, persons above the rank of Supervisors or Directors, Volunteer Coordinator, Recreation Therapist, Registered Nurses, Maintenance Attendant, Unit Clerks" (140 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	135
Number of persons who cast ballots	103
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	103
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	61
Number of ballots marked in favour of intervener	42
Number of ballots segregated and not counted	0

4054-05-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1167471 Ontario Limited o/a Mudges (E.) Appliance & Service Shop (Wharncliffe) (Respondent)

Unit: "all employees of 1167471 Ontario Limited o/a Mudges (E.) Appliance & Service Shop (Wharncliffe), in the City of London, Ontario, save and except Vice President/Owner and all those above the rank of Vice President/Owner." (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

4089-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Konecranes Canada Inc o/a Crane Pro Services (Respondent)

Unit: "all employees of Konecranes Canada Inc. o/a Crane Pro Services working in and out of the Municipality of Burlington, Ontario, save and except persons above the rank of working foreperson, office and sales staff, parts personnel, and shipping and receiving personnel" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names	13

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

4091-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Konecranes Canada Inc o/a Crane Pro Services (Respondent)

Unit: "all employees of Konecranes Canada Inc. o/a Crane Pro Services working in and out of the Municipality of Whitby, Ontario, save and except persons above the rank of working foreperson, office and sales staff, parts personnel, and shipping and receiving personnel" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

3214-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Michael Monteith Enterprises Limited and Monteith Building Group Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

1261-04-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Royal Overhead Doors Ltd. (Respondent)

Unit: "all journeymen and apprentice carpenters and all construction labourers in the employ of Royal Overhead Doors Ltd. in all sectors of the construction industry save and except the ICI sector, in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and all journeymen and apprentice carpenters and all construction labourers in the employ of Royal Overhead Doors Ltd. in all other sectors of the construction industry save and except the ICI sector, in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foremen." (0 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

0502-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Martin Utility Corp. (Respondent)

Unit: "all construction labourers in the employ of Martin Utility Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Martin Utility Corp. in all other sectors of the construction industry within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit) (Clarity Note)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

2483-05-R: Manufacturing, Transportation, and Allied Workers Union, Local 519, affiliated with Christian Labour Association of Canada (Applicant) v. Superior Machine and Tool (Chatham) Ltd. (Respondent)

Unit: "all employees of Superior Machine and Tool (Chatham) Ltd. in the municipality of Chatham-Kent, save and except those already represented by a trade union, supervisors and persons above the rank of supervisor, and persons employed in a confidential capacity in matters relating to labour relations" (10 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	4

3764-05-R: Teamsters Local Union No. 879 (Applicant) v. St. Thomas Ford Lincoln Sales Limited (Respondent)

Unit: "all employees of St. Thomas Ford Lincoln Sales Limited, employed in the city of St. Thomas, save and except supervisors, persons above the rank of supervisor, office and clerical staff, sales consultants and tower operators" (36 employees in unit)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names	33

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	4

3851-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited engaged in cleaning/housekeeping and building services employed at Covent Garden Market, 130 King Street in the City of London, save and except supervisors and persons above the rank of supervisors and office staff." (9 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

3902-05-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Engineered Suspensions Ltd. (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Intervenor)

Unit: "All employees of Ontario Engineered Suspensions Ltd. in Blenheim, in the County of Chatham-Kent, save and except Foremen, persons above the rank of Foreman, Office and Sales Staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (142 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	142
Number of persons who cast ballots	121
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	92
Number of segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	71
Number of ballots marked in favour of intervenor	49
Number of ballots marked in favour of no union	1
Number of ballots segregated and not counted	0

3920-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Steelcare Inc. (Respondent)

Unit: "All employees of Steelcare Inc. in the City of Hamilton save and except supervisors and those above the rank of supervisor, office, clerical, and sales staff and truck drivers." (43 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	24

3945-05-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. JRL HVAC Inc. (Respondent)

Unit. "all journeyperson and apprentice refrigeration and air-conditioning mechanics, maintenance mechanics and technicians performing HVAC maintenance and/or service work employed by JRL HVAC Inc. at and out of the City of Brampton, Ontario, save and except persons above the rank of working foreperson" (27 employees in unit)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	0

3964-05-R: Teamsters Local Union No. 419 (Applicant) v. Atlas Cold Storage Canada Limited (Respondent)

Unit: "all Shipping & Receiving Clerks of Atlas Cold Storage Canada Limited in the City of Vaughan, Ontario, save and except supervisors and persons above the rank of supervisor" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

4090-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Konecranes Canada Inc o/a Crane Pro Services (Respondent)

Unit: "all employees of Konecranes Canada Inc. o/a Crane Pro Services working in, at and out of the Municipality of Windsor, Ontario, save and except persons above the rank of working foreperson, office and sales staff, parts personnel, and shipping and receiving personnel" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

0373-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. 870528 Ontario Limited o/a Lido Construction Co. (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183, Labourers' International Union of North America (Intervenors)

0401-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Exclusive Carpentry Enterprises Limited (Respondent) v. Universal Workers Union, Labourers' International Union of North America, Local 183, Labourers' International Union of North America (Intervenors)

0452-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Professional Carpentry Ltd. (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183, Labourers' International Union of North America (Intervenors)

0455-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Matera Carpentry Contractors Ltd. (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183, Labourers' International Union of North America (Intervenors)

2657-04-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Rockford Tile Contractors (1996) Ltd. (Respondent) v. Brick and Allied Craft Union of Canada, and Brick and Allied Craft Union of Canada, Local 31, Tile, Terrazzo & Marble Guild of Ontario Inc. (Intervenors)

3893-04-R: Fuel Oil & Natural Gas Service Technicians Association (Applicant) v. Petro Partners Ltd. (Respondent)

1556-05-R: Universal Workers' Union, Labourers' International Union of North America Local 183 (Applicant) v. Top Vinyl & Aluminum Contracting Inc. (Respondent) v. Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Intervenor)

2165-05-R: Labourers' International Union of North America, Local 625 (Applicant) v. K.F.L. Construction (Windsor) Inc. (Respondent)

2512-05-R: Labourers' International Union of North America, Local 1036 (Applicant) v. M.A. Mortenson Company (Respondent)

3648-05-R: Labourers' International Union of North America, Local 1089 (Applicant) v. 646849 Ontario Ltd. c.o.b. as Magic Maid Cleaning Service (Respondent)

3953-05-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pre-Eng Contracting Limited Constaff Construction Limited, Novacrete Construction Ltd. (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

3774-05-FC: United Food and Commercial Workers International Union, Local 1993 (Applicant) v. SNS Hotels/Restaurant c.o.b. as Brantford Holiday Inn (Respondent) *(Granted)*

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

4272-Y2-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Penwood Manufacturing Company Ltd., Penwood Custom Manufacturing Ltd., Penwood Custom Woodwork Ltd., Penwood Kitchens Inc. (Respondents) *(Withdrawn)*

1311-03-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Page Flooring Enterprises Inc. and, Page Carpet Services(Whitby)Inc. and, Ashton-Brown Page Contract Interiors Inc. (Respondents) *(Withdrawn)*

1770-03-R: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 700 (Applicant) v. Serco Canada Ltd. and/or, Dock Products Canada Inc., SPX Canada Inc. and/or, Edwards Door Systems Limited (Respondents) *(Dismissed)*

2969-04-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 622379 Ontario Limited c.o.b. Climate Control (Respondent) v. 1479250 Ontario Ltd. c.o.b. as Ottawa Plumbing and Heating (Intervenor) *(Withdrawn)*

3775-04-R: International Union of Operating Engineers, Local 793 (Applicant) v. Quinte Crane Rentals Inc. and, C.A. Peters Crane Rentals Inc. (Respondents) *(Withdrawn)*

3894-04-R: Fuel Oil & Natural Gas Service Technicians Association (Applicant) v. Petro Partners Ltd. (Respondent) *(Withdrawn)*

3837-04-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Mold-Tech Electrical Services Inc.; CWP Packaging Limited c.o.b. as Industrial Concepts Services (Respondents) *(Granted)*

1317-05-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Dynastat Service Limited; M & K Climatecare (Respondents) *(Dismissed)*

3058-05-R: Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Precision Construction and, PreFab Engineered Wall Systems Inc. (Respondents) *(Terminated)*

3470-05-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Century Electric Ltd., Emiliano Tony Ingarra cob as Century Electric and, AMT Electric Inc. (Respondents) *(Granted)*

3472-05-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastown Electric Company Inc. /, Maktor Limited (Respondents) *(Endorsed Settlement)*

3510-05-R: United Steelworkers of America, Local 1-2693 (Applicant) v. Abitibi Consolidated Inc., North Star Forestry Ltd., Wagner Ontario Forest Management Limited, and, Wagner Forest Management Ltd. (Respondents) *(Terminated)*

3556-05-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Trudel & Sons Roofing Ltd. and, 1226213 Ontario Inc. o/a Trudel Enterprises (Respondents) *(Terminated)*

3635-05-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Landmark Contracting Ltd. and, Landmark Ontario Ltd. (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

4272-02-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Penwood Manufacturing Company Ltd., Penwood Custom Manufacturing Ltd., Penwood Custom Woodwork Ltd., Penwood Kitchens Inc. (Respondents) *(Withdrawn)*

1311-03-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Page Flooring Enterprises Inc. and, Page Carpet Services(Whitby) Inc. and, Ashton-Brown Page Contract Interiors Inc. (Respondents) *(Withdrawn)*

1770-03-R: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 700 (Applicant) v. Serco Canada Ltd. and/or, Dock Products Canada Inc., SPX Canada Inc. and/or, Edwards Door Systems Limited (Respondents) *(Dismissed)*

2969-04-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. 622379 Ontario Limited c.o.b. Climate Control (Respondent) v. 1479250 Ontario Ltd. c.o.b. as Ottawa Plumbing and Heating (Intervenor) *(Withdrawn)*

3775-04-R: International Union of Operating Engineers, Local 793 (Applicant) v. Quinte Crane Rentals Inc. and, C.A. Peters Crane Rentals Inc. (Respondents) *(Withdrawn)*

3837-04-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Mold-Tech Electrical Services Inc., CWP Packaging Limited c.o.b. as Industrial Concepts Services (Respondents) *(Granted)*

1317-05-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Dynastat Services Limited, M & K Climatecare (Respondents) *(Dismissed)*

3058-05-R: Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Precision Construction and, PreFab Engineered Wall Systems Inc. (Respondents) *(Terminated)*

3470-05-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Century Electric Ltd., Emiliano Tony Ingarra cob as Century Electric and, AMT Electric Inc. (Respondents) *(Granted)*

3472-05-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastown Electric Company Inc. / Maktor Limited (Respondents) *(Endorsed Settlement)*

3510-05-R: United Steelworkers of America, Local 1-2693 (Applicant) v. Abitibi Consolidated Inc., North Star Forestry Ltd., Wagner Ontario Forest Management Limited and Wagner Forest Management Ltd. (Respondents) *(Terminated)*

3556-05-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Trudel & Sons Roofing Ltd. and 1226213 Ontario Inc. o/a Trudel Enterprises (Respondents) *(Terminated)*

3635-05-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Landmark Contracting Ltd. and Landmark Ontario Ltd. (Respondents) *(Withdrawn)*

UNION SUCCESSOR RIGHTS

3936-04-R; 4210-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, Thistle Printing Limited (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Thistle Printing Limited (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

3937-04-R; 4208-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division (Maintenance Group) and, Quebecor World Islington (A Division of Quebecor World Inc.) (Respondents) v. Graphic Communications International Union/International Brotherhood Of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M)(GCIU/IBT Conference, Local 100-M) (Intervenor) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M) Maintenance Group and, Quebecor World Islington (A Division of Quebecor World Inc.) (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

3938-04-R; 4207-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division (Press Group) and, Quebecor World Islington (A Division of Quebecor World Inc.) (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M) Press Group and, Quebecor World Islington (A Division of Quebecor World Inc.) (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

3939-04-R; 4218-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, Paragon Industrial Photographic Reproductions Limited (Also operating as Paragon dpi Scarborough) (Respondents) *(Granted)*; Graphic Communications International Union/ International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Paragon Industrial Photographic Productions Limited (Also operating as Paragon dpi Scarborough) (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local 100-G (Intervenor) *(Terminated)*

3940-04-R; 4205-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, The Council of Printing Industries of

Canada on behalf of G.M. Thornton & Son Limited (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), The Council of Printing Industries of Canada on behalf of G.M. Thornton & Son Limited (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

3944-04-R; 4214-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, Finzer Roller formerly Bingham Company (Canada) Limited (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M), Finzer Roller formerly Bingham Company (Canada) Limited (Respondents) v. Communications, Energy and Paperworkers Union of Canada Lcoal 100-G (Intervenor) *(Terminated)*

3946-04-R; 4206-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, The Council of Printing Industries of Canada on behalf of MPH Graphics Inc. (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), The Council of Printing Industries of Canada on behalf of MPH Graphics Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

3947-04-R; 4204-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, The Council of Printing Industries of Canada on behalf of Kendall Printing Company Limited (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), The Council of Printing Industries of Canada on behalf of Kendall Printing Company Limited (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

3979-04-R; 4212-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M Specialty Division and, Georgia Pacific Canada, Consumer Products, Inc. (Respondents) Terminated); Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M)and, Georgia Pacific Canada, Consumer Products, Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Lcoal 100-G (Intervenor) *(Granted)*

4222-04-R; 4384-04-R: Communications, Energy and Paperworkers Union of Canada, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M Newspaper Division, Herald Press Ltd. (Respondents) *(Terminated)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Herald Press Ltd. (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local 100-G (Intervenor) *(Granted)*

4230-04-R; 4388-04-R: Communications, Energy and Paperworkers Union of Canada, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M Newspaper Division, Border Press Inc. (Respondents) *(Terminated)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Border Press Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local 100-G (Intervenor) *(Granted)*

4289-04-R; 4383-04-R: Communications, Energy and Paperworkers Union of Canada Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M Specialty Division, Specialized Packaging London (Respondents) *(Terminated)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Specialized Packaging London (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Granted)*

4329-04-R; 4568-04-R: Communications, Energy and Paperworkers Union of Canada, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, Quebecor World Richmond Hill (A Division of Quebecor World Inc.) (Respondents) v. Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Intervenor) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Quebecor World Richmond Hill (A Division of Quebecor World Inc.) (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Terminated)*

0412-05-R; 0591-05-R: Communications, Energy and Paperworkers Union of Canada Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Specialty Division and, Winpak Technologies Inc. (Respondents) (Terminated Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M) and Winpak Technologies Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Granted)*

0414-05-R; 0584-05-R: Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Specialty Division and , Atlantic Packaging Products Ltd. (High Density Division) (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M) and Atlantic Packaging Products Ltd. (High Density Division) (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Granted)*

0415-05-R; 0582-05-R: Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Specialty Division and Lily Cups Inc. (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M) and, Lily Cups Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Intervenor) *(Granted)*

0416-05-R; 0585-05-R: Communications, Energy and Paperworkers Union of Canada Local 100-G (Applicant) v. Stanley Manufacturing Company, Graphic Communications International Union, Local 100-M, Specialty Division (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M) and, Stanley Manufacturing Company (Respondents) *(Granted)*

0417-05-R; 0588-05-R: Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Newspaper Division and, The Hamilton Spectator (A Division of CityMedia Group Inc.) (Mailroom) (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M) and, The Hamilton Spectator (A Division of CityMedia Group Inc.) (Mailroom) (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Intervenor) *(Granted)*

0418-05-R; 0590-05-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Specialty Division and, Atlantic Packaging Products Inc (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M) and, Atlantic Packaging Products Ltd. (Respondents) v.Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Intervenor) *(Granted)*

0419-05-R; 0589-05-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Specialty Division, Atlantic Packaging Products Ltd. (Brampton Corrugated) (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M) and, Atlantic Packaging Products Ltd. (Brampton Corrugated) (Respondents) *(Granted)*

0421-05-R; 0583-05-R: Communications, Energy and Paperworkers Union of Canada, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Newspaper Division, The Sudbury Star (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M), The Sudbury Star (Respondents) *(Granted)*

0422-05-R; 0587-05-R: Communications, Energy and Paperworkers Union of Canada, Local Union 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Newspaper Division, The Hamilton Spectator (A Division of CityMedia Group Inc.) (Pressroom) (Respondents) *(Terminated)*; Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100-M (GCC/IBT, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M), The Hamilton Spectator (A Division of CityMedia Group Inc.) (Pressroom) (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0883-04-R: RMS Equipment Company (Applicant) v. United Steelworkers of America and its Local 80 (Respondent) *(Granted)*

2612-05-R: Richard Arnold et al (Applicant) v. Service Employees' International Union Local 1.on (formerly Local 519.ca) or Local 2 (Respondent) v. Stratford Shakespearean Festival of Canada (Intervenor) *(Granted)*

Unit: "all employees of the Stratford Shakespearean Festival of Canada at Stratford, engaged in maintenance of the buildings and groups and plant operations, save and except foremen, persons above the rank of foreman and supervisor, office and sales staff, students employed during the school vacation period and employees covered by existing collective agreements between the Stratford Shakespearean Festival of Canada and other Trade Unions" (42 employees in unit)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	16
Number of ballots marked against respondent	23

Number of ballots segregated and not counted	1

3759-05-R: Melinda Chandler (Applicant) v. Ontario Public Service Employees Union on behalf of its Local 356 (Respondent) v. North Hastings Children's Services (Intervenor) *(Granted)*

Unit: "the Employer recognizes the Union as the sole and exclusive bargaining agent for all employees of North Hastings Children's Services in the Town of Bancroft, save and except office and clerical, Programme Coordinators, those above the rank of Programme Coordinator, students employed during the school vacation period and co-op students." (18 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent1	0
Number of ballots segregated and not counted	0

3797-05-R: Adam Jennings (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. Brant Screen Craft ULC (Intervenor) *(Dismissed)*

Unit: "the employer recognizes the union as the sole and exclusive bargaining agent for its employees in the City of Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, students working for the summer, part-time workers working less than twenty-four (24) hours per week, and employees in the Art Department" (88 employees in unit)

Number of names of persons on revised voters' list	90
Number of persons who cast ballots	89
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	87
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent5	6
Number of ballots marked against respondent	30
Number of ballots segregated and not counted	2

3952-05-R: Cindy Marchand (Applicant) v. United Steel Workers of America, AFL-CIO-CLC on behalf of Local 13292-12 (Respondent) *(Granted)*

3954-05-R: Viviane Leger (Applicant) v. United Food & Commercial Workers Local 175 (Respondent) v. Compass Group Canada (Beaver) Ltd. (Intervenor) *(Granted)*

Unit: "all food service employees employed at business and industry accounts and educational institutional accounts of the Company working at, in or out of the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, Unit Managers, office and sales staff." (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

4276-05-R: Richard Ashton and Ahmed Momen (Applicant) v. United Steelworkers (Respondent) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3889-05-U: DaimlerChrysler Canada Inc. (Applicant) v. CAW-CANADA, Local 1285, Basil Hargrove, Robert Chernecki, Jerry Dias, Paulo Ribeiro and Leon Rideout (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3881-05-U: United Steel Workers, Local 1-500 (Applicant) v. Architectural Moldings Ltd. (Respondent) *(Withdrawn)*

3967-05-U: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Limited (Respondent) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1487-03-U: United Steelworkers of America (Applicant) v. Telespectrum Worldwide Canada Inc. (Respondent) *(Withdrawn)*

2117-03-U: Leona Hughes (Applicant) v. Retail, Wholesale Canada/CAW, Local 462 (Respondent) v. Hershey Canada Inc. (Intervenor) *(Terminated)*

1678-04-U: Paul Gopal (Applicant) v. Ontario Public Service Staff Union (Respondent) v. Ontario Public Service Employees Union (Intervenor) *(Dismissed)*

2766-04-U: Antoni Halonski (Applicant) v. United Steelworkers of America (Respondent) *(Terminated)*

3163-04-U; 3164-04-U: Labourers' International Union of North America, Local 1059 (Applicant) v. D. Grant & Sons Limited and, CGC Enterprises Design Manage Construct Inc. (Respondents); International Union of Brick and Allied Craftworkers, Local 5 (Applicant) v. D. Grant & Sons Limited and, CGC Enterprises Design Manage Construct Inc. (Respondents) *(Withdrawn)*

0504-05-U: Graphic Communications Conference of the International Brotherhood of Teamsters (GCC/IBT) Local 100-M (Applicant) v. Communications, Energy and Paper Workers Union of Canada, Local 100-G and, Michael Marsbergen,, Dan Huziak,, David Winn and, Mark Owen, (Respondents) v. The Board of Trustees of the Council of Printing Industries of Canada/Graphic Communications International Union Local 100-M Pension Trust Fund, Quebecor World Richmond Hill (a division of Quebecor World Inc.), Quebecor World Islington (a division of Quebecor World Inc.) (Interveners) *(Withdrawn)*

1142-05-U: David Brown (Applicant) v. Canadian Union of Public Employees, Local 4153 and, Hamilton-Wentworth District School Board (Respondents) *(Withdrawn)*

1194-05-U: Canadian Union of Public Employees and its Locals 2936 and 2936-08 (Applicant) v. Community Living Ajax-Pickering and Whitby (Respondent) *(Withdrawn)*

1319-05-U: International Union of Painters and Allied Trades, Local 1824 (Applicant) v. Aves & Shaw Limited (Respondent) *(Terminated)*

1573-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Goodyear Canada Inc. (Respondent) *(Withdrawn)*

1707-05-U: Labourers' International Union of North America, Local 527 (Applicant) v. Greely Construction Ltd., NCI Ottawa Inc., G-Civil Inc. (Respondents) *(Withdrawn)*

1753-05-U: Canadian Union of Public Employees (Applicant) v. Halton Catholic District School Board (Respondent) *(Withdrawn)*

1757-05-U: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) *(Withdrawn)*

1791-05-U: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Zavarella Construction Ltd. (Respondent) *(Withdrawn)*

1910-05-U: James Wayne MacKenzie (Applicant) v. United Food and Commercial Workers International Union, CCL, AFL-CIO Local 333 (Respondent) v. Sheraton Fallsview, Hotel & Conference Centre (Intervenor) *(Dismissed)*

1972-05-U: NCI Ottawa Inc. (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) *(Withdrawn)*

2191-05-U: National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada) and its Local 1941 (Applicant) v. Autoliv Canada Inc. (Respondent) *(Withdrawn)*

2358-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union (United Steelworkers) (Applicant) v. Ivaco Rolling Mills LP, A Heico Company, Ingersoll Fasteners, A Division of Ifastgroup LP, A Heico Company, Infasco Nut, A Division of Ifastgroupe LP, A Heico Company Ifastgroupe LP Heico Holding Inc. and The Heico Companies, L.L.C. (Respondents) *(Withdrawn)*

2393-05-U: Myrtle McLean (Applicant) v. Canadian Union of Public Employees, Local 815 (Respondent) *(Withdrawn)*

2401-05-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Thyssenkrupp Budd Systems Canada Inc. and, Quality Systems and Innovations Inc. (Respondents) *(Withdrawn)*

2531-05-U: Wendy Edwards (Applicant) v. Canadian Union of Public Employees Local 4400 (Respondent) *(Dismissed)*

2573-05-U: Manufacturing, Transportation, and Allied Workers Union, Local 519, affiliated with Christian Labour Association of Canada (Applicant) v. Superior Machine and Tool (Chatham) Ltd. (Respondent) *(Withdrawn)*

2625-05-U: Adrian Strong (Applicant) v. United Auto Workers, Local 251 (Respondent) v. Waterville TG Inc. - Ontario Plant (Intervenor) *(Withdrawn)*

2647-05-U: Teamsters Local Union No. 419 (Applicant) v. U-Pak Disposal (1989) Limited (Respondent) *(Terminated)*

2797-05-U: Murray Hill (Applicant) v. Canadian Union of Public Employees, Local 793 (Respondent) v. The University of Waterloo (Intervenor) *(Dismissed)*

2826-05-U: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Home Lumber Inc. (Respondent) *(Withdrawn)*

3034-05-U: United Steelworkers 1-2693 (Applicant) v. Neenah Paper Company of Canada (Respondent) *(Dismissed)*

3173-05-U: Robert Monk (Applicant) v. Northern Construction Worker's Union (Respondent) v. Pioneer Construction Inc. (Intervenor) *(Withdrawn)*

3175-05-U: Mario de Sousa (Applicant) v. CUPE - Local 1144 (Respondent) v. St. Joseph's Health Centre (Intervenor) *(Withdrawn)*

3195-05-U: Ontario Public Service Employees Union on its own behalf and on behalf of Shelley Canning and Sara Lauten (Applicant) v. Canadian Blood Services (Respondent) *(Withdrawn)*

3233-05-U: Marnie L. Henderson (Applicant) v. Service Employee International Union Local 1.on (Respondent) v. Central Park Lodges (Intervenor) *(Withdrawn)*

3253-05-U: Wayne G. Greco (Applicant) v. Ontario English Catholic Teachers Association (OECTA) Huron Superior Unit (Respondent) *(Withdrawn)*

3261-05-U: Wray Rendell (Applicant) v. CAW-Canada Local 222 (Respondent) v. A.G. Simpson Automotive Systems (Intervenor) *(Dismissed)*

3297-05-U: Joana Sousa (Applicant) v. United Food and Commercial Workers Canada, Local 1000A (Respondent) *(Withdrawn)*

3305-05-U: Aramark Canada Ltd. (Applicant) v. UNITE HERE Ontario Council and UNITE HERE Ontario Council Local 75 (Respondents) *(Withdrawn)*

3355-05-U: Wayne Samms (Applicant) v. L.I.U.N.A. Local 183 (Respondent) *(Terminated)*

3530-05-U: Shirley Lucas (Applicant) v. Service Employees International Union, Local 1.on (Respondent) v. Donway Place (Intervenor) *(Withdrawn)*

3539-05-U: Slavko Gavric (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Dismissed)*

3587-05-U: Zahid Nawaz (Applicant) v. UFCW Local 333 (Respondent) *(Dismissed)*

3649-05-U: Michelle MacPhee (Applicant) v. (CAW) Union Local 4451 (Respondent) *(Withdrawn)*

3685-05-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bondfield Construction Company Ltd. (Respondent) *(Withdrawn)*

3686-05-U: Martin Farrugia Badge No. 51425 and Mathew Dicecco Badge No. 50882 (Applicant) v. The Amalgamated Transit Union Local 113 (Respondent) v. Toronto Transit Commission (Intervenor) *(Withdrawn)*

3710-05-U: Communications, Energy and Paperworkers Union of Canada, Local 591-G (Applicant) v Curwood Packaging (Canada) Ltd. (Respondent) *(Withdrawn)*

3725-05-U: Mike Dewell (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) & its Local 222 (Respondent) v. A.G. Simpson Automotive Systems (Intervenor) *(Dismissed)*

3746-05-U: Canadian Union of Public Employees and its Local 1281 (Applicant) v. Carleton University Students Association (Respondent) *(Withdrawn)*

3752-05-U: Catherine Eskander (Applicant) v. Unite Here Local 75 (Respondent) *(Withdrawn)*

3817-05-U: Labourers International Union of North America, Local 837 (Applicant) v. National Rigging and Transportation Ltd. (Respondent) *(Withdrawn)*

3819-05-U: Amalgamated Transit Union, Local 113 (Applicant) v. Toronto Transit Commission (Respondent) *(Withdrawn)*

3826-05-U: Service Employees International Union Local 1.on (Applicant) v. Hilltop Manor Nursing Home (Respondent) *(Terminated)*

3830-05-U: The Canadian Office and Professional Employees' Union, Local 550 (Applicant) v. Rehab Express Inc. (Respondent) *(Withdrawn)*

3850-05-U: Dan Godfrey (Applicant) v. OPSEU Ontario Liquor Board Employees Union (Respondent) v. Liquor Control Board of Ontario (Intervenor) *(Withdrawn)*

3865-05-U: Murray Bist (Applicant) v. The Amalgamated Transit Union Local 1587 (Respondent) v. Miller Transit Ltd. (Intervenor) *(Withdrawn)*

3875-05-U: George Vinge (Applicant) v. Canadian Autoworkers' Union Local 1090 (Respondent) *(Withdrawn)*

3882-05-U: United Steel Workers, Local 1-500 (Applicant) v. Architectural Moldings Ltd. (Respondent) *(Withdrawn)*

3899-05-U: Leeroy McCalla (Applicant) v. Amalgamated Transit Union Local 1587 (Respondent) v. Miller Transit Limited (Intervenor) *(Terminated)*

3976-05-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), and its Local 195 (Applicant) v. Windsor Airline Limousine Services Limited o/a Veteran Cab Company and Capital Cab Company (Respondent) *(Withdrawn)*

3987-05-U: Corey Smart (Applicant) v. C.U.P.E. Local 79 (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

2410-04-M; 2429-04-M: Local 636, of the International Brotherhood of Electrical Workers (Applicant) v. Hydro Ottawa Limited (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3897-05-M: Sierra Legal Defence Fund Society (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) *(Granted)*

TRUSTEESHIP

0083-05-T: Canadian Union of Public Employees (Applicant) v. CUPE Local 1919 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

1887-04-JD: Canadian Office and Professional Employees Local 491 (Applicant) v. Canadian Union of Public Employees and Canadian Staff Union (Respondents) v. Administrative and Technical Staff Union (ATSU) (Intervenor) *(Granted)*

2930-04-JD: Labourers' International Union of North America, Local 837 (Applicant) v. International Union of Operating Engineers, Local 793 and Priestly Demolition Inc., Dufferin Construction Company (Respondents) v. Ontario Association of Demolition Contractors Inc. (Intervenor) *(Granted)*

3570-05-JD: Elementary Teachers' Federation of Ontario (Applicant) v. The Hastings and Prince Edward District School Board (Respondent) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3323-05-M: St. Christopher House (Applicant) v. Canadian Union of Public Employees and its Local 3393 (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1430-05-OH: Rodney John Barber (Applicant) v. West Star Printing Ltd. (Respondent) *(Terminated)*

3273-05-OH: Stephen R. Giffin (Applicant) v. Wal-Mart Canada Corp. (Respondent) *(Terminated)*

3545-05-OH: John A. Mertes (Applicant) v. St. Lawrence Structures Inc. (Respondent) *(Withdrawn)*

3595-05-OH: Paul L Mabee (Applicant) v. The Township of Georgian Bay Fire Department (Respondent) *(Withdrawn)*

3761-05-OH: Ronald Stone (Applicant) v. Pestell Minerals & Ingredients Inc. (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

4271-02-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Penwood Manufacturing Company Ltd., Penwood Custom Manufacturing Ltd., Penwood Custom Woodwork Ltd., Penwood Kitchens Inc. (Respondents) *(Terminated)*

4064-03-G; 4079-04-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Cloke-Kirby Construction Limited (Respondent) *(Terminated)*

1397-05-G: Central Ontario Regional Council of Carpenters Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Applicant) v. M.J. Framing Inc. (Respondent) *(Withdrawn)*

2074-05-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Otis Canada Inc. (Respondent) *(Granted)*

2328-05-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. K & S Electric; K & S Electric Inc.; K & S Electrical Contractors Ltd. (Respondent) *(Endorsed Settlement)*

2689-05-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Symtech Innovations Ltd. (Respondent) *(Endorsed Settlement)*

3042-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Superior Stucco and Drywall Inc. (Respondent) *(Granted)*

3126-05-G: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Associated Paving Company Ltd. (Respondent) *(Endorsed Settlement)*

3469-05-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Century Electric Ltd., Emiliano Tony Ingarra cob as Century Electric and AMT Electric Inc. (Respondents) *(Granted)*

3471-05-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastown Electric Company Inc. / Maktor Limited (Respondents) *(Endorsed Settlement)*

3473-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. 849060 Ontario Inc. c.o.b. Air Con Systems (Respondent) *(Granted)*

3490-05-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. (Respondent) *(Endorsed Settlement)*

3491-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. and Oreste Perruzza (Respondents) *(Endorsed Settlement)*

3492-05-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pieroni Carpentry Ltd. and Robert Pieroni (Respondents) *(Endorsed Settlement)*

3498-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1099708 Ontario Inc. o/a D.V.C. Enterprises (Respondent) *(Withdrawn)*

3558-05-G: Brick and Allied Craft Union of Canada, Local 29 and International Union of Bricklayers and Allied Craftworkers, Local 29 (Applicant) v. BMC Masonry, a Division of 2032686 Ontario Limited (Respondent) *(Withdrawn)*

3571-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Mitchell Welding (Respondent) *(Granted)*

3636-05-G: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Landmark Ontario Ltd. (Respondent) *(Withdrawn)*

3762-05-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (the "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Belmont Drywall Systems Ltd. (Respondent) *(Withdrawn)*

3805-05-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Santos Drywall General Contracting Ltd. (Respondent) *(Endorsed Settlement)*

3808-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gambi Group Inc. a.k.a. Gambi Industries Inc. and Franco Gambino (Respondents) *(Granted)*

3834-05-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Maple Insulation Ltd. (Respondent) *(Endorsed Settlement)*

3836-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. LaSalle Backhoe Service a Division of Winkup Construction Ltd. (Respondent) *(Endorsed Settlement)*

3844-05-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Paul McGarth c.o.b. as A & K Installations (Respondent) *(Granted)*

3859-05-G: Ontario Concrete & Drain Contractors' Association and, Universal Workers Union, Labourers' International Union of North America Local 183 (Applicants) v. Choiceland Contractors Limited (Respondent) *(Endorsed Settlement)*

3874-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. World Wide Drain Corporation (Respondent) *(Endorsed Settlement)*

3877-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mehmet Ozgur c.o.b. as Gold Star General Stucco, Drywall and Painting Company and Gold Star Stucco Ltd. (Respondents) *(Granted)*

3879-05-G: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. DC Corex Construction Ltd. (Respondent) *(Granted)*

3885-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. X-Act Contracting Ltd. (Respondent) *(Granted)*

3886-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Aecon Industrial (Respondent) *(Withdrawn)*

3888-05-G: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. 1372243 Ontario Inc. o/a Canadian Air Systems (Respondent) *(Withdrawn)*

3898-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Skywall Systems Inc. and The Sky Construction Inc. (Respondents) *(Granted)*

3906-05-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Scotco Insulation Services, Scotco Insulation Services Inc., Scotco Insulation Services (2004) Inc. (Respondent) *(Endorsed Settlement)*

3931-05-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. SARP Sewer Services Pickering, Division of SARP Toronto Inc. (Respondent) *(Terminated)*

3940-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Bramalea Ornamental Inc. (Respondent) *(Endorsed Settlement)*

3942-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Air Con Systems A Division of 849060 Ontario Inc. (Respondent) *(Endorsed Settlement)*

3971-05-G: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. DeSousa Painters Limited (Respondent) *(Granted)*

3978-05-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2222 (Applicant) v. Traugott Building Contractors Inc. (Respondent) v. Labourers' International Union of North America, Local 1081 (Intervenor) *(Withdrawn)*

3981-05-G; 3982-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing IronWorkers, Local 721 (Applicant) v. Alberici Constructors Ltd. (Respondent) *(Withdrawn)*

4006-05-G: Labourers International Union of North America, Local 493 (Applicant) v. Cambrian Construction and Masonry Company, a Division of 385310 Ontario Inc. and Cambrian Construction (Sudbury) Inc. (Respondents) *(Granted)*

4011-05-G; 4012-05-G; 4013-05-G: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Limited (Respondent) *(Withdrawn)*

4021-05-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. 1430986 Ontario Inc. c.o.b. Roper Controls (Respondent) *(Endorsed Settlement)*

4030-05-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Edward Wayne Baxter, Michael John Baxter, Kevin James Baxter and Steven Glenn Baxter c.o.b. as Baxter Installations (Respondent) *(Granted)*

4040-05-G: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Union Local 124 (Applicant) v. Diamond Contracting (PETAWAWA) Inc. (Respondent) *(Granted)*

4074-05-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. L.S.R. Drywall Limited (Respondent) *(Withdrawn)*

4075-05-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Drywall Plus Ltd. (Respondent) *(Withdrawn)*

4077-05-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. 1509513 Ontario Inc. c.o.b. as Hollywood Painting (Respondent) *(Withdrawn)*

4102-05-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northern Drywall Inc. (Respondent) *(Withdrawn)*

4107-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.F. Structures Group Inc. and Antonio Fontana (Respondents) *(Endorsed Settlement)*

4108-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ell-Rod Holdings Inc. and Rodney L. Finney (Respondent) *(Withdrawn)*

4109-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yustin Interiors Limited and Deborah Yustin (Respondent) *(Endorsed Settlement)*

4122-05-G; 4123-05-G: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. DC Corex Construction Ltd. (Respondent) *(Withdrawn)*

4125-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1186993 Ontario Inc o/a Demo Plus (Respondent) *(Granted)*

4138-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. M & M System Interior Limited (Respondent) *(Granted)*

4157-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Zabit Otag c.o.b. as Diyar Construction (Respondent) *(Granted)*

4176-05-G: Ontario Concrete & Drain Contractors' Association and Universal Workers Union, Labourers' International Union of North America Local 183 (Applicants) v. Ni-Co Concrete & Drain Ltd. (Respondent) *(Granted)*

4177-05-G: Ontario Concrete & Drain Contractors' Association and Universal Workers Union, Labourers' International Union of North America Local 183 (Applicants) v. Camara's Concrete & Drains Ltd. (Respondent) *(Granted)*

4178-05-G: Ontario Concrete & Drain Contractors' Association and Universal Workers Union, Labourers' International Union of North America Local 183 (Applicants) v. Mardill Concrete & Drain Ltd. (Respondent) *(Granted)*

4189-05-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Can-Am Glass & Mirror Ltd. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

0127-04-ES: Justina Eng, a Director of Glamour Look Ltd. (Applicant) v. Arshad Ali et al and Director of Employment Standards (Respondents) *(Granted)*

1923-04-ES: Bowes Publishers Limited (Applicant) v. Donna Demers and, Director of Employment Standards (Respondents) *(Withdrawn)*

3993-04-ES: Daniel Pambrun (Applicant) v. Remisys Corporation and Directeur des normes d'emploi (Respondents) *(Dismissed)*

4248-04-ES: Integra Investigation Services Ltd. (Applicant) v. Charles C. Amanquah, Director of Employment Standards (Respondents) *(Granted)*

4251-04-ES: Annie Brereton (Applicant) v. RMK Investments Inc. and Director of Employment Standards (Respondents) *(Granted)*

4339-04-ES: Wainright Transportation Services o/a 692792 Ontario Ltd. (Applicant) v. Michael Ball and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4431-04-ES: Robert Penfold (Applicant) v. Windsor Disposal Services Ltd., Director of Employment Standards (Respondents) *(Terminated)*

0043-05-ES: Erin Fuller (Applicant) v. Loyalty Management Group Inc. and Director of Employment Standards (Respondents) *(Withdrawn)*

0050-05-ES: Nick Jensen (Applicant) v. Cinemavault Releasing International Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

0467-05-ES; 0546-05-ES: 1322396 Ontario Inc. (Applicant) v. David Newmark and, Director of Employment Standards (Respondents) *(Dismissed)*; David Newmark (Applicant) v. 1322396 Ontario Inc. (Pioneer Petroleums) and Director of Employment Standards (Respondents) *(Granted)*

0497-05-ES: Robert J. Wright, John Simmons, John H. Murray and Brian E. Baker (Applicant) v. Brent Cowell, Lester Smith, Paul Bourgon, George Hurley, Keith Yurkiw, Jacqueline Kendel, Michael Rutherford, Christian M. Mathews, Jennifer Gunn, Director of Employment Standards, Maxwell T. MacLean, Robert N. Fox (Respondents) *(Withdrawn)*

0832-05-ES: Chris Yates (Applicant) v. Roy Foss Motors Ltd. and Director of Employment Standards (Respondents) *(Withdrawn)*

0907-05-ES: Zeran Builders & Wood Specialties Ltd. o/a Crafter's Market (Applicant) v. Linda Synott and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0944-05-ES: W. & W. Cartage Ltd. (Applicant) v. Ronald Trites and Director of Employment Standards (Respondents) *(Dismissed)*

1027-05-ES: Spectrum of Colours Inc. (Applicant) v. Behrouz Nameghi and Director of Employment Standards (Respondents) *(Dismissed)*

1046-05-ES: Joanne Hoang (Applicant) v. Foto Express, Director of Employment Standards (Respondents) *(Dismissed)*

1377-05-ES: Premier Operating Corporation, Limited (Applicant) v. Norman Culley and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1752-05-ES: D. Ken Woo (Applicant) v. J & J Wood Products and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1817-05-ES: Canadian Home Energy Services Inc. (Applicant) v. Robin Hanley and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1841-05-ES: Deco-Style Marketing Ltd. (Applicant) v. Diane Lecour and Director of Employment Standards (Respondents) *(Granted)*

2274-05-ES: Michael Worden (Applicant) v. Premier Fitness and Director of Employment Standards (Respondents) *(Withdrawn)*

2286-05-ES: Yvonne Chapman (Applicant) v. Dr. David Gardner and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2314-05-ES: The Oak Stair Limited (Applicant) v. Claudio Carvallo and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2316-05-ES: Marina Gutierrez (Applicant) v. Grand & Toy Limited and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2317-05-ES: Shalini Dev (Applicant) v. A&W Restaurants (ON) Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2340-05-ES: Jana Leanne Matikainen (Applicant) v. Toromont CAT and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2348-05-ES: 1407981 Ontario Inc. oprating as Café Andreou (Applicant) v. Giovanni Magliano and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2445-05-ES: Griffith Laboratories Limited (Applicant) v. Linda McAllister and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2489-05-ES: Christopher Nelson Pither, a Director of Barrie Coin Stamp & Gift Shop Ltd. (Applicant) v. Kenneth J. Snowman and Director of Employment Standards (Respondents) *(Dismissed)*

2492-05-ES: Leif Karlsson (Applicant) v. Group 4 Falck (Canada) Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2497-05-ES: Romex Security Inc. (Applicant) v. Renee Lirette and Director of Employment Standards (Respondents) *(Dismissed)*

2535-05-ES: George Polach (Applicant) v. Bosch Rexroth Group and Director of Employment Standards (Respondents) *(Dismissed)*

2596-05-ES: Richard Campbell (Applicant) v. Southwestern Sales Corporation Limited and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2621-05-ES: Ideal Supply Company Limited (Applicant) v. Terrance Rushton and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2688-05-ES: 1471943 Ontario Ltd. o/a Monkey See Monkey Do Childcare Centre (Applicant) v. Stacey Todd and Director of Employment Standards (Respondents) *(Terminated)*

2721-05-ES: The Gourmet Cup Foods Ltd. (Applicant) v. Shelley Phillipow and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2745-05-ES: Cathy Martens (Applicant) v. Advanced Recruitment Consultants Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2776-05-ES: Ilangovan Kulsingham (Applicant) v. Astoria Shish Kebob House Inc. and Director of Employment Standards (Respondents) *(Withdrawn)*

2792-05-ES: Le Grandi Firme Internazionali (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

2814-05-ES: 2046385 Ontario Ltd., c.o.b. Countryside Motel (Applicant) v. Alicia Faria and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2816-05-ES: 1613685 Ontario Inc. o/a Morningside Suzuki (Applicant) v. Janice Cassidy and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2855-05-ES: Mid-Town Wings Company (Applicant) v. Dan Obress and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2896-05-ES: Anne Normand (Applicant) v. Anjura Services Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2983-05-ES: Sukhjit Singh Ghumman, a Director of Fateh Group Inc. o/a Nirvana, The Flavors of India (Applicant) v. Mukesh Chander Joshi, Darhwan Singh and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2995-05-ES: Kelsey's Road House (London) Ltd. (Applicant) v. Paul Sutton and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3020-05-ES: Charlene Pinner (Applicant) v. Toromont Cat and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3026-05-ES: Rialto Watch Jewelry Inc. (Applicant) v. Lana Chow and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3063-05-ES: Salvator Flores (Applicant) v. 1118741 Ontario Limited o/a Irpinia Kitchens and Director of Employment Standards (Respondents) *(Withdrawn)*

3064-05-ES: Grace Longo (Applicant) v. Mainline Services Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3096-05-ES: Louise Warren (Applicant) v. 1323348 Ontario Ltd. o/a Passionate Kisses and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3105-05-ES: 1185235 Ontario Limited o/a AMS Travel 95 (Applicant) v. Ms. Izabela Ozog and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3166-05-ES: Ernest Pietrobon, a director of Recycle Plus Ltd. (Applicant) v. William Manning and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3167-05-ES: Luiza Pietrobon, a director of Recycle Plus Ltd. (Applicant) v. William Manning and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3170-05-ES; 3171-05-ES: Luiza Pietrobon and Ernest Pietrobon, directors of Recycle Plus Ltd. (Applicant) v. Juan Barahona and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3178-05-ES: Toronto Convention & Visitors Association (Applicant) v. Angela Morfidis and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3224-05-ES: Robert Spietaels, a director of Marina Shores Ltd., Wendy Spietaels, a director of Marina Shores Ltd. (Applicants) v. Bradley A. Woodward and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3247-05-ES: United Rentals of Canada, Inc. (Applicant) v. Sackveer Atwall, and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3266-05-ES: Resolve BPO Inc. (Applicant) v. Oubah Osman and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3277-05-ES: Westminster Trails Limited Partnership (Applicant) v. Douglas Scott and Director of Employment Standards (Respondents) *(Terminated)*

3302-05-ES: Adam Lavender (Applicant) v. Cherokee Trailer and Supply Company and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3307-05-ES: Drummond Fuels (Ottawa) Ltd. (Applicant) v. Mark Longland and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3324-05-ES: Eastern Ontario Young Offenders Services (Applicant) v. Michael Akins and Director of Employment Standards (Respondents) *(Withdrawn)*

3341-05-ES: Sandra Carafa and Peiman Beigbabai (Applicant) v. Alma Leah Malto and Director of Employment Standards (Respondents) *(Terminated)*

3347-05-ES: Investment Planning Counsel (Applicant) v. Nikoletta Trasias-Dimitrievski, and Director of Employment Standards (Respondents) *(Terminated)*

3372-05-ES: Premier Fitness Clubs Inc., Premier Fitness Clubs (Yorkdale) Inc. and Curzons Management Associates Inc. (Applicant) v. Paula Valeriote and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3408-05-ES: Stephanie Singh (Applicant) v. Bell World / Ru Communicating Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3441-05-ES: MultiCorp Office Services Inc. (Applicant) v. Christopher James and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3444-05-ES: Mediclean Inc. (Applicant) v. Mabel Mintos and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3445-05-ES: Mediclean Inc. (Applicant) v. Abdulhaphiz Osman and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3480-05-ES: Mr. Donald Walsh (Applicant) v. Mueller Canada and Director of Employment Standards (Respondents) *(Withdrawn)*

3482-05-ES: Richard Severin (Applicant) v. CM Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3483-05-ES: KAS Personnel Services Inc. (Applicant) v. Jeff Smith and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3522-05-ES: Marnor Insurance and Financial Services Inc. (Applicant) v. Tasha Roberts and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3606-05-ES: Municipal Parking Corporation (Applicant) v. Bille-Jo Bryson and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3616-05-ES: Smith & Brooks Services Inc. (Applicant) v. Jose Alatorre and Director of Employment Standards (Respondents) *(Terminated)*

3617-05-ES: Canadian Electrical Raceways Inc. (Applicant) v. Florencio Tiri and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3628-05-ES: Knob Hill Farms Limited (Applicant) v. Abdul Shaikh and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3640-05-ES: Kam-Wing Ng (Applicant) v. John H. Pike Holdings Limited o/a Canadian Tire and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3641-05-ES: Albert Blight (Applicant) v. Lakeridge Precision Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3667-05-ES: Raynald Pomerleau (Applicant) v. Frost Trucking and Directeur des normes d'emploi (Respondents) *(Terminated)*

3672-05-ES: Christine Jennings (Applicant) v. Bateman House Furniture and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3688-05-ES: Agnieszka Chelminska (Applicant) v. Sammy's Bar & Grill and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3758-05-ES: Agata Kacprzak (Applicant) v. Kania Lawyers and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3842-05-ES: Weijie Ma (Applicant) v. Quality & Co. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3843-05-ES: Kenneth Horrell (Applicant) v. Fastening House Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3893-05-ES: Charles Bennett, Sigfried Mueller, Robert Gratton and Bob Sparrow, Directors of Agri-West Corporation (Applicant) v. Scott Dingwall., Daniel Flipsen., Archie Garlough., Barbara Grubb., Roger Lafleche., Donna Laughlin., David Mayhew., Terry McElroy., Ronald McMahon., Steve McNaughton., Michael Nagel., Mark Pemberton., Edward Rusenstrom., Susan Schmidt., Roger Seguin., Donald Shayer., David Sinclair., Leo Vanderydt, Gordon Button and Director of Employment Standards (Respondents) *(Dismissed)*

3917-05-ES: Kania Lawyers (Applicant) v. Agata Kacprzak and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3933-05-ES: Bert's Auto Repairs (Applicant) v. Jeff Haines and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3951-05-ES: Sylvie Brochu (Applicant) v. District School Board Ontario North East and Director of Employment Standards (Respondents) *(Dismissed)*

3970-05-ES: Kim Roper (Applicant) v. Jostens Canada and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4048-05-ES: Brown Window Corporation (Applicant) v. Pedro Carreiro and Director of Employment Standards (Respondents) *(Withdrawn)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2990-03-HS: Quebecor World Inc. (Applicant) v. Kirk Hounsome, Kevin Bonnis and John Harkins, Inspector (Respondents) *(Withdrawn)*

1266-04-HS ; 2389-04-HS ; 0755-05-HS; 0756-05-HS: Modu-Scaf Inc. (Applicant) v. Aggrey Emojong, Inspector (Respondent) *(Endorsed Settlement)*; Modu-Scaf Inc. (Applicant) v. Labourers' International Union of North

America, Local 506, and Aggrey Emojong, Inspector (Respondents); Scafom Canada Inc. (formerly known as Modu-Scaf Inc.) and Conterra Restoration Ltd. (Applicant) v. Bryan Pitt, Inspector (Respondent) *(Endorsed Settlement)*

2206-04-HS: Thompson, Roach and Hughes Consulting Inc. o/a The TRH Group (Applicant) v. Dwayne Mittelstaedt, Inspector (Respondent) *(Withdrawn)*

4574-04-HS: OPSEU Local 256 (Applicant) v. City of Hamilton, Emergency Medical System, John Pierroz, Inspector (Respondents) *(Withdrawn)*

1462-05-HS: Weyerhaeuser Company Limited (Applicant) v. Communications, Energy and Paperworkers Union of Canada (C.E.P.) Local 105, Communications, Energy and Paperworkers Union of Canada (C.E.P.) Local 1323, International Union of Operating Engineers, Local 865 and Ministry of Labour (Respondents) *(Endorsed Settlement)*

1964-05-HS: Derrick Stairs (Applicant) v. Coca-Cola Bottling Ltd. and Cynthia Paquette, Inspector (Respondents) *(Withdrawn)*

2158-05-HS: United Food and Commercial Workers International Union Local 1000A (Applicant) v. Loblaws Supermarket Limited and Gavin Tait, Inspector (Respondents) *(Withdrawn)*

2325-05-HS: United Food and Commercial Workers International Union Local 1000A (Applicant) v. Loblaws Supermarket Limited and Gloria Bergen, Inspector (Respondents) *(Withdrawn)*

2408-05-HS: United Food and Commercial Workers International Union Local 1000A (Applicant) v. Loblaws Supermarket Limited and Gloria Bergen, Inspector (Respondents) *(Withdrawn)*

2694-05-HS; 2695-05-HS: The Corporation of the City of North Bay (Applicant) v. CUPE Local 122 and Joanne Thisdelle, Inspector (Respondents) *(Endorsed Settlement)*

3969-05-HS: Huron Perth Healthcare Alliance (Stratford General Hospital) (Applicant) v. Canadian Union of Public Employees and Ron Elliot, Inspector (Respondents) *(Granted)*

REFERRAL FROM MINISTER

3927-05-M: Ottawa Region Masonry Contractors' Association (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) *(Granted)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

2589-05-PS: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local No. 222 (Applicant) v. Ajax/Pickering Transit Authority, Town of Whitby, Town of Clarington, Oshawa Transit Service, Handi Transit, Canadian Union of Public Employees, Local 129-01, Canadian Union of Public Employees, Local 53, Teamsters Local 938 (Respondents) v. Durham Region Planning Department (Intervenor) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3302-01-ES: Xiaoyun Dong (Applicant) v. Ingle Life & Health Assurance Company and Ministry of Labour (Respondents) *(Dismissed)*

3261-04-JD; 3504-04-JD: Operative Plasterers', Cement Masons', Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 (Applicant) v. Colonial Building Restoration and International

Union of Bricklayers and Allied Craftworkers, Local 7 and Labourers' International Union of North America, Local 527 (Respondents) v. Masonry Industry Employers Council of Ontario and 0ntario Masonry Contractors Association (Intervenors); Colonial Building Restoration (Applicant) v. Bricklayers and Allied Craftworkers, Local 7; Labourers' International Union of North America, Local 527; Operative Plasterers', Cement Masons', Restoration Steeplejacks International Association of the United States and Canada, Union Local 598 and R.J.W. Stonemasons, a Division of 921879 Ontario Ltd. (Respondents) v. Masonry Industry Employers Council of Ontario and 0ntario Masonry Contractors Association (Intervenors) *(Dismissed)*

0944-05-ES: W. & W. Cartage Ltd. (Applicant) v. Ronald Trites and Director of Employment Standards (Respondents) *(Dismissed)*

2758-05-U: Gerald F. Jordan (Applicant) v. C.U.P.E. 416 (Respondent) *(Dismissed)*

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ISSN 0383-4778